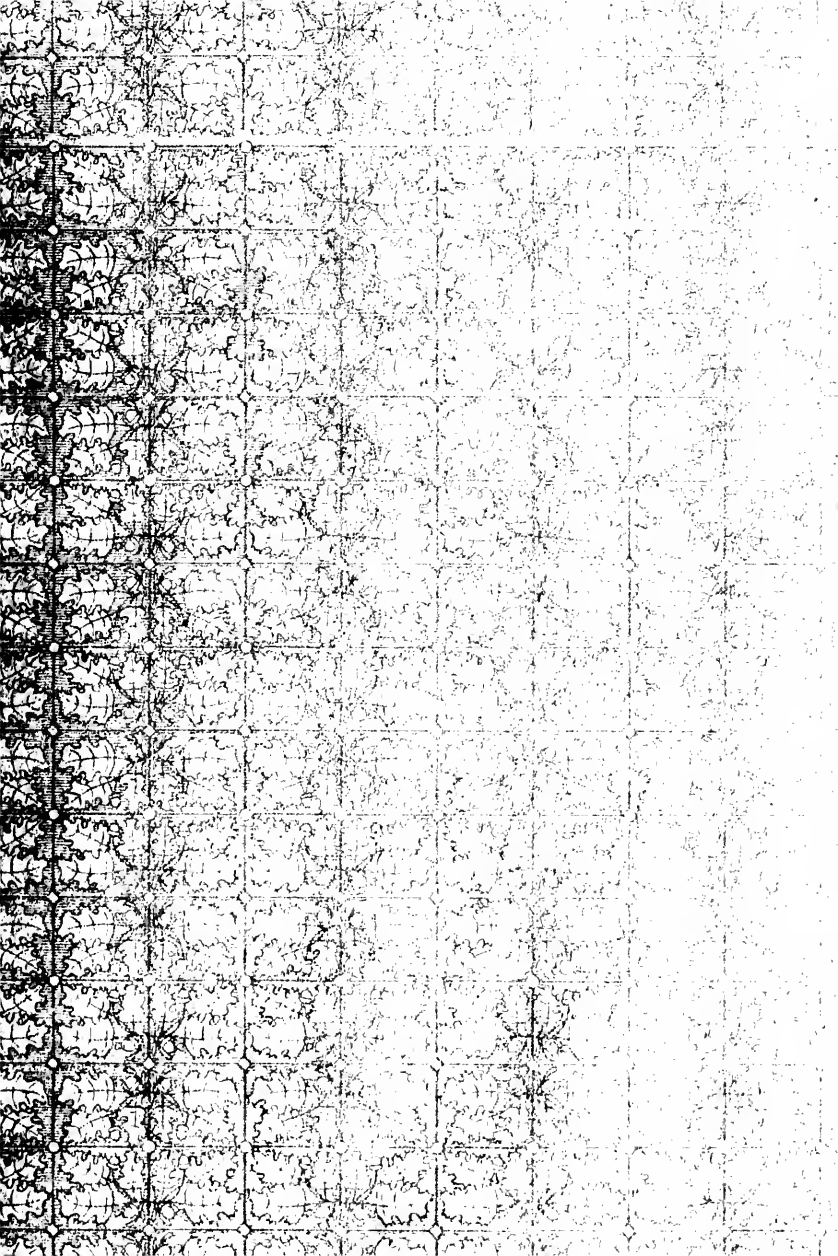

CASES

ON

Criminal Procedure

SELECTED FROM THE DECISIONS OF THE

Supreme Court of Iowa

BY

ROLLIN M. PERKINS
Professor of Law in the
State University of Iowa

VOL. III

PUBLISHED BY THE EDITOR

PREFACE

The collection of cases of which this book forms the third volume, is intended for the use of students in the College of Law of the State University of Iowa. Criminal Procedure, as taught in this college, constitutes a part of a course known as Criminal Law and Procedure. The cases studied by the class in connection with the substantive criminal law, are selected from the decisions of the English courts and the courts of this country. In view of these facts it is thought that the cases in this branch of the course may be limited to the decisions of the Supreme Court of Iowa without creating in the minds of the students any false notions in regard to the value of the cases of other jurisdictions. This restriction has resulted in some sacrifice, because of the fact that the cases best adapted for class room work are not all to be found in a single jurisdiction. But it is thought that this sacrifice is more than balanced by other considerations. However valuable may be the cases from other jurisdictions, either from the standpoint of jurisprudence in general or from that of case book material, it would be a grave mistake to send graduates out to practice law in the state of Iowa without an appreciation of the value of Iowa cases to the Iowa practitioner. In the opinion of the undersigned the only sure way in which that appreciation may be developed is by having one branch of law, at least, in the study of which those cases form the ground work. If all the case books here used were limited to Iowa decisions, the result would be a narrowness of view entirely incompatible with sound theories of legal education, but there is no danger of that as is evidenced by the fact that the great majority of cases studied are from other jurisdictions. Criminal Procedure was selected for the purpose mentioned, for the reason previously given and for the reason that there is perhaps no branch of the law that is better adapted to this purpose. The selection of cases has been influenced by the desire to place the emphasis where it belongs as a matter of Iowa law, rather than as a matter of general juris-

prudence. With this in mind, together with the limitation of time allowed for this study, some problems have been disposed of by brief statements or by quotations from the Code. Other problems have been left to the cases—the cases are not intended to be illustrative of the text. Where the original statements of facts given by the reporter are used, they are placed in quotation marks, because, for the most part, the facts have been restated where any statement in addition to the opinion of the court has seemed desirable. Figures in parentheses and without other explanation refer to the section numbers of the Code of 1897; those prefixed by the initials "C. C.," designate the section numbers of the Compiled Code of 1919.

ROLLIN M. PERKINS

IOWA CITY, 1921

TABLE OF CONTENTS

PART III

THE TRIAL

CHAPTER IX

CHAPTER X

CHAPTER XI

CHAPTER XII

TABLE OF CASES

PART III

THE TRIAL

CHAPTER IX

CERTAIN RIGHTS OF DEFENDANT AS TO TRIAL

SECTION 1

RIGHTS AS TO THE TIME OF TRIAL

When the defendant has been indicted; has been arrested unless he appeared voluntarily; has been arraigned or has waived the arraignment; and has entered his plea of not guilty, the proceedings are in shape for trial. But although the proceedings are ready for trial the parties may not be. The defendant may desire a change of venue, or either party may wish for a continuance. The matter of change of venue having been disposed of in another place,[1] we now have to consider the problem of continuance and with it all the problems that relate to the time of trial. Two rights inhere in the defendant, which protect him on both sides in this regard. The first of these is the right to a speedy trial; the other is the right not to be forced to trial until he has had due time for preparation.

The right of a person charged with the commission of a public offense to demand a speedy trial dates back to Magna Charta and finds expression today in the Constitution of Iowa.[2] A "speedy trial" does not necessarily mean a trial forthwith. The machinery of justice is not so adapted that every man accused of crime can be tried on the day that he is indicted or arrested. Due regard must be given to the terms of court. More than this, the state is entitled to a reasonable time to prepare its case and get ready for trial. The purpose of this right is not in the least to embarrass the prosecuting officer in the performance of his duty, but only to prevent unreasonable imprisonment without trial, which was

[1] Chapter VIII, Section 3 (b).

[2] Article 1, section 10; for the same guaranty in proceedings in the Federal Courts see the Sixth Amendment to The Constitution.

anciently a means of great oppression. The right of the accused in this regard precedes the indictment, for it is provided that "when a person is held to answer for a public offense, if an indictment be not found against him at the next regular term of court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown" (5535, C. C. 9585). After indictment the protection is by the stipulation that "if a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of court in which the indictment is triable after the same is found, the court must order it to be dismissed, unless good cause to the contrary is shown" (5536, C. C. 9586). The right of the state to move for a continuance is subject to this in addition to the usual restrictions (5370 and 3663 to 3674 inclusive, C. C. 9432, 7458–7469).

At the time the defendant enters his plea he can demand three days in which to prepare for trial (5370, C. C. 9432). These he may require as a matter of right without even giving his reasons therefor. If these three days are not sufficient he is entitled to file a motion for a continuance (5370 and 3663 to 3674 inclusive, C. C. 9432, 7458–7469), which should be granted unless the need for additional time was occasioned by the fault or negligence of the defendant or his counsel (3663, C. C. 7458).

"Motions for a continuance on account of the absence of evidence must be found on the affidavit of the party, his agent or attorney and must state:

I. The name and residence of such witness, or, if not known, that the affiant has used reasonable diligence to ascertain them, and in either case facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

II. Efforts constituting due diligence which have been used to obtain such witness, or his testimony;

III. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proven" (3664, C. C. 7459).

"If the application is insufficient, it shall be overruled; if sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated" (3665, C. C. 7460).

STATE v. MURDY

Supreme Court of Iowa, 1891. 81 Iowa 603, 47 N. W. 867.

From a judgment of conviction of murder in the second degree the defendant appealed.

ROBINSON, J.—On the eighth day of October, 1889, Silas Tipton was shot with a pistol in the hands of defendant, and died from the effects of the wound received on the tenth day of that month.

I. The indictment was presented by the grand jury on the twenty-seventh day of November, 1889, and, on the same day, the defendant was arraigned, and pleaded not guilty. On the twenty-eighth day of January, 1890, that being the second day of the January term of court, the defendant filed an application for a continuance. The application was based on the alleged sickness of attorneys, and the absence of witnesses, and was supported by affidavits. Objections and counter-affidavits were filed on the part of the state, and the application was denied, but with leave to defendant to amend it. Additional affidavits were filed by the defendant, and objection and counter-affidavits were again filed by the state. The application was sustained as to the witness, Ida Blanchard, unless the state would admit that she would testify to the facts stated in the affidavit for a continuance, if present. The state then admitted that she would so testify, and the cause was continued until the afternoon of the fifth day of February, and a continuance for the term was refused. At the same time the parties were ordered to make a showing on the fourth day of February, as to the condition of defendant's counsel, and as to any witness who should be unable to testify at that time. No showing was made by defendant on the fourth, but on the next day he filed a showing with regard to the witness Ledbetter. To that showing the state filed objections and counter-affidavits, and the application was overruled.

The appellant complains of several rulings on the application. He insists that it was improper to permit the filing of counter-affidavits. Those filed tended to show that the alleged sickness of the attorneys for defendant did not exist; that one of them was not in fact employed until about the time the cause should have been ready for trial, if then, and that the witnesses, who, it was claimed, were sick and unable to attend court, were in fact in good health, or in such condition of health that they could readily attend court without danger of injury. None of the counter-affidavits sought to contradict the averments of the affidavits as to what the testimony of the witnesses would be. It was held in *State v. Rainsbarger*, 74

Iowa, 199, that other allegations of fact might be contradicted by counter-affidavits. See, also, *State v. Wells*, 61 Iowa, 630. The counter-affidavits filed in this case were proper under the rule adopted in those cases.

. . . . . .

Affirmed.

STATE *v.* DAKIN

Supreme Court of Iowa, 1879. 52 Iowa 395, 3 N. W. 411.

The defendant having been convicted of murder, appealed.

ROTHROCK, J.—The indictment was found at the April term, 1878, of the Marshall District Court. The defendant was arraigned, pleaded not guilty, and by agreement the cause was continued to the next term, which occured in October, 1878. The alleged crime was committed on the 27th day of March, 1878. At the October term the defendant filed a motion for a change of the place of trial, grounded upon the alleged prejudice of the inhabitants of Marshall county against him. The motion also alleged that the inhabitants of the county of Story were so prejudiced against him that he could not have a fair trial in that county. The requisite number of affidavits were filed in support of the motion. There were counter affidavits filed upon the part of the State. On the 26th day of October the motion was submitted to the court, and was overruled.

On the 28th day of October the defendant filed a motion for continuance, and in support thereof he filed therewith his affidavit in these words:

"I, John N. Dakin, being sworn, say that I am defendant; that I cannot safely proceed to trial at the present term by reason of the absence of material witnesses; that the names of said witnesess are Joseph Dakin, Harriet Dakin, Edward Dakin and Andrew Dakin; that their present whereabouts are unknown to me; that they resided until very recently in Liberty township, Marshall county, Iowa, and had resided in said township nearly two years, and in said county nearly twenty years; that said Harriet Dakin is wife of said Joseph Dakin, and said Edward and Andrew Dakin are their sons, and residing all in one family; that they removed from said Liberty township on or about the 14th day of October, 1878 with the intention, as I am informed and believe, to go to Jewell county, Kan.; that their intention to so remove before the present term of this court was not known to me; that I did not learn or know or have any information of their departure or intention to depart before the present term of this court until the morning of

Saturday, Oct. 26, 1878, when I first learned they had gone; that I saw and conversed for a moment with said Joseph a short time before he went away, in the presence of several parties, at the door of the jail in this county, through the wicket; that I had opportunity to do no more than barely speak to him, and told him I would want him as a witness on the trial of the case; he replied that the case would not be tried here and that he would not be needed at the next term of this court; that it was then my intention, and I believe he knew of it, to apply for a change of venue; that I didn't then know whether my trial would come at this term of the court, and didn't know or expect he intended to leave here immediately and before this court would convene; that I didn't have said witness subpoenaed because I didn't then know whether said cause would be tried at this term of court or when it would be tried, and because I supposed that as they resided in the county I could procure their attendance upon a few hours notice, and because I expected my application for a change of venue would be granted; that I was surprised my application for said change of venue was refused by the court, and that my trial would come on this term, and because of all said matters I didn't have subpoenas issued for said witnesses.

"That I expect to prove by said witnesses, Edward and Andrew, the following facts: On the evening of the alleged murder of John K. Stough they were at my barn looking for a horse that had formerly been owned by me, and which they expected to find in my barn, and that on their return I accompanied them together to their father's house, a distance of about five miles from my residence, and from the place where the body of John K. Stough was found the next morning; that in company with them I started on horseback—all on horseback—from my barn early in the evening, at or before eight o'clock; that we went out directly to their father's, Joseph Dakin's, house; that I remained there a few minutes for the purpose of seeing if I could purchase a horse from Joseph, and between eight or nine o'clock—nine probably—near nine, I left his house; that when they came to my barn that I was there at the barn and was preparing to go to Joseph Dakin's, getting my horse ready for that purpose, and that my wife was there with me at the time; that I expect to prove said facts by each of said witnesses and do not know of any other witness or witnesses by whom I can prove the same facts, except that I can prove by my wife that I was at the barn when they came, and by Joseph Dakin and his wife that I was at their house.

"That I expect to prove by Joseph Dakin that between the hours of eight and nine o'clock of the evening of the night on which John K. Stough was killed, I was at his house; that he and his wife had retired to bed before I arrived there; that I called him up and he came out and I conversed with him a few minutes about purchasing a horse from him, and then left, about nine o'clock or before.

"That I expect to prove by said Harriet Dakin that she knew my voice and heard me call, and heard me speaking with her husband, who stood in the door with the door open; that I also stood near the door; that it was about nine P. M.

"That I am advised by counsel said facts are material; that said facts are true, and I do not know of any other witnesses by whom all of said facts can be proved; that this application is not made for delay merely, but that justice may be done; that I expect to be fully able to procure the testimony of said witnesses by their personal attendance or by their depositions in time, etc., that it has been impossible for me since I learned that they had left the county to procure their depositions, and that I do not know at present where their depositions could be conveniently taken, nor that they could be taken at all before their arrival in Kansas; nor am I certainly advised as to the particular locality where they will go, except that it is understood by their friends that they have gone to Jewell county, Kansas." Signed and verified.

And on the 29th day of October, 1878, defendant filed an additional affidavit in support of said motion for a continuance, stating under oath the following:

"That in addition to the matter stated in my first affidavit I expect, also, to be able to prove by said Andrew and Edward Dakin that as they were approaching my residence on the evening referred to they met deceased (Stough) only a short distance from my residence; that deceased was on foot going in a direction from my residence, and in the direction in which the body was found the next morning; that I did not make the application for a continuance on the second day of the term because it was not then certain that the cause would be tried at this term, and for the reason that I did not then know of the absence, or intention to be absent, of the four witnesses named in my original affidavit; that after the determination of the motion for a change of venue, on Saturday, the sixth day of the term, I sent for my attorneys to consult with them in reference to the matter of asking for a continuance on account of the absence of said witnesses, and other matters pertaining to my

defense, when I learned that H. C. Henderson and James Allison, my attorneys who have had principal charge of my defense, were absent, Mr. Allison procuring affidavits to support the change of venue, and Mr. Henderson in attendence at the U. S. Circuit Court at Des Moines, and Mr. Merriman, my other attorney, who has had very little to do with my defense in this case, was engaged in the trial of a cause in this court, and was unable to give any attention to my case. I had no other attorneys employed in the case, and was unable to procure the preparation of a motion and affidavit for continuance until the day of the date of said motion, and that I caused said application to be made as soon as practicable after I learned that it would be necessary to make the same; that I sent for my attorneys early that morning, and informed Mr. Henderson, who came to the jail to see me, of the absence of said witnesses, and the necessity of making the application for a continuance, and the same was thereafter made as soon as practicable; I therefore ask that this be made a part of my original application, etc."

The district attorney filed objections to the motion for continuance, in which it was urged that said motion did not show that the defendant made any effort to secure the attendance of said witnesses at that term, nor to procure their testimony, and because said motion was not filed until the seventh day of the term, and no sufficient reason shown why it was not filed on the second day thereof.

The motion for continuance was overruled on the 29th day of October, and upon the same day the defendant was put on trial.

We have copied the affidavit and amended affidavit in full, to the end that the showing of diligence to procure the testimony of the absent witnesses may fully appear. It is necessary that we should also state that the record before us shows that at the April term, 1878, it was directed by the court that the civil business should occupy the first week of the next term, and that the criminal business should not be taken up until the second week of the term, and that it has been the practice for the court, after the commencement of the term, to assign causes on the docket for particular days, and that on Friday of the first week of the term this cause was assigned and set down for trial on Tuesday of the next week. The practice is for parties to subpoena their witnesses to attend according to the assignment of the causes, unless because of anticipated absence of witnesses, or inability to subpoena them, parties subpoena them at their own discretion.

Taking all these circumstances in connection with the affidavit

and amendment thereto, we are clearly of the opinion that the motion for continuance should have been sustained. An affidavit for continuance is not traversable—that is, counter-affidavits are not allowed to be filed in contradiction of its statement of facts. *State v. Scott,* 44 Iowa, 93. It is shown that the defendant did not know of the removal of said witnesses until the morning of the 26th of October, which was on Saturday. His application for continuance was filed on Monday, the 28th. We have no doubt the court below overruled the motion because it was thought the defendant should have known of the removal of these witnesses before that time. But it appears that the defendant was not at large upon bail. He was confined in the jail of the county before the removal of the witnesses, and it is to be presumed he remained in confinement awaiting his trial up to the time he made the motion. That the evidence set forth in the application was most material is not denied by the state. It goes to the very merits of the case.

We are thus met at the very threshold of this case with reversible error. We need go no further. Complaint is made of the overruling of the motion for change of the place of trial. Upon the record, as it was when the motion was overruled, there was no error. In the progress of the trial there appears to have been quite an excited state of the public mind, as is always the case in the investigation of such a terrible tragedy. The interest in the case was increased by the sworn confession of another party, made after the verdict against the defendant, to the effect that he, and not the defendant, was the murderer of Stough. If this motion for change of venue should be renewed upon the cause being remanded, it will be for the court to determine from such a showing as may then be made whether the defendant can have a fair and impartial trial in Marshall county. The other errrors complained of we need not discuss. They are such as will not likely occur upon a new trial.

Reversed.

SECTION 2

RIGHT TO A PUBLIC TRIAL

Secrecy prevails in proceedings before the grand jury,[1] but by ancient tradition of the common law the trial itself is held in open

[1] Chapter V, section 1, and see §§5265 and 5267, C. C. 9321, 9329.

court. This right of one accused in a criminal prosecution to have a public trial is secured to him by the Constitution of Iowa.[2]

STATE *v.* WORTHEN

Supreme Court of Iowa, 1904. 124 Iowa 408, 100 N. W. 330.

The defendant appealed from a judgment of conviction of the crime of breaking and entering a dwelling house in the nighttime with the intent to commit rape.

SHERWIN, J.—After the jury had been impaneled for the trial, the county attorney asked that the defendant's witnesses be excluded from the courtroom during examination of the other witnesses, and that they be kept apart from each other. This was objected to by the defendant, whereupon the attorney for the State asked that the jury be excluded from the room during the argument of the request. The jury was thereupon retired in charge of an officer, and after a statement of the reasons for the request the court ordered the witness excluded, and the order was enforced. The action of the court in thus excluding the witnesses and in sending the jury from the room pending the argument is complained of. On the first point it is urged that the witnesses called for the defendant were a part of the general public, and that their exclusion from the trial was in violation of section 10, art. 1, of the Constitution of the State, in that it deprived the defendant of the public trial therein provided for. We do not think the sequestration of the defendant's witnesses infringed upon his constitutional right to a public trial. We are cited to no authority which so holds, while, on the other hand, many courts have held that the matter is within the sound discretion of the trial court in the absence of a statute on the subject. In Cooley's Constitutional Limitations (6th Ed.) 379, it is said: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend." This seems to be the recognized rule as to the public. See, also, Black's Constitutional Law (2nd Ed.) 585; *People* v. *Kerrigan*, 73 Cal. 222 (14 Pac. Rep. 849); *People* v. *Swafford*, 65 Cal. 223 (3 Pac. Rep. 809). The constitutional guaranty of a public trial is for

[2] Article 1, section 10, the Sixth Amendment to The Constitution gives the same guaranty in prosecutions by the United States.

the purpose of securing to the accused a perfectly fair and honest consideration by his triers of the charge made against him, and further to prevent, in some measure at least, the giving of false testimony against him. Its purpose is not to aid in producing false testimony in his own behalf, and by so doing defeat the ends of justice. Where it appears, therefore, that the sequestration of the witnesses for either the State or the defendant will more certainly conduce to a fair trial and a just result, there can be no just complaint thereof. The rule is thus stated by Greenleaf in vol. 1, section 432, *et seq.* (16th Ed.): "If the judge deems it essential to the discovery of truth that the witnesses should be examined out of the hearing of each other, he will so order it. This order, upon the motion or suggestion of either party, is rarely withheld, but by the weight of authority the party does not seem entitled to it as a matter of right. It is not necessary that all witnesses should be excluded. The court has discretion to exclude some and to allow others to remain, and the asking party cannot complain that such exceptions are made." The same rule is stated in 1 Bishop on Criminal Procedure, section 1188; 3 Jones on Evidence, section 807, and cases cited; 3 Wharton on Criminal Law, section 3009, p. 73; *Zoldoske* v. *State,* 82 Wis. 580 (52 N. W. Rep. 778); Abbott's Crim. Trial Brief, section 338; *Dickson v. State,* 39 Ohio St. 73; *Davis v. Byrd,* 94 Ind. 525; *Davenport v. Ogg,* 15 Kan. 363; *Hey's Case,* 32 Gratt. 946 (34 Am. Rep. 799); *People v. Boscovitch,* 20 Cal. 436. There was no error in excluding the jury while the question was being discussed; no constitutional right of the defendant was thereby invaded, and we pass the point without further comment.

. . . . . .

Affirmed.

SECTION 3

RIGHT TO A TRIAL BY JURY

The same section of the Constitution of Iowa (Article 1, section 10) which insures to those accused the right to a speedy and public trial, gives them also the right to a trial by an impartial jury, the wording being: "in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have the right to a speedy and public trial by an impartial jury". The section immediately preceding this one provides that "the right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in

inferior courts." It will be seen at once that while these two sections have certain ground in common, they are by no means the same. The one first quoted applies only to criminal cases, but the other, without such limitation, provides that the right of trial by jury shall remain inviolate subject to the qualification that in inferior courts the jury may be made, by legislation, to consist of less than twelve. Subject to this provision as to number the right of trial by jury shall remain as it was at the common law. Of this right of trial by jury it is said by Blackstone[1] that "in *Magna Charta* it is more than once insisted on as the principal bulwark of our liberties". But there were a number of petty offenses which, prior to the adoption of the various constitutions in this country, were triable summarily before a magistrate without a jury. The provision that "the right of trial by jury shall remain inviolate" does not apply to such cases, but the provision giving a right to a trial by an impartial jury "in all criminal prosecutions" is broad enough to do so.

Thus the right of trial by jury shall remain inviolate except that the number may be changed in the inferior courts, and in addition to this the accused has a right to a jury in all criminal prosecutions. This does not authorize a jury in a proceeding for contempt, which though punitive in its nature is not a criminal proceeding;[2] but it does apply to offenses triable summarily before a justice of the peace or other officer.[3] Yet it does not necessarily apply to the summary trial. Thus it was held that one brought before a police court for a violation of a city ordinance was not entitled to a jury trial in that court, the provision of the constitution being protected by his right of appeal to a court in which he would be entitled to a jury.[4] The truth of the matter probably is that the framers of the constitution did not contemplate the introduction of a jury into the summary trial of petty offenses, because the provision is that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law . . . . saving to the defendant the right of appeal" (Article 1, section 11). Nothing in the constitution, however, forbids legislative provision for a jury in such proceedings, and juries are

[1] 4 Comm. 350.

[2] *Ex parte Grace* (1861), 12 Iowa 208, 79 Am. Dec. 529.

[3] Provided for by Article 1, Section 11, of the Constitution of Iowa.

[4] *Zelle* v. *McHenry* (1879), 51 Iowa 572, 2 N. W. 264.

authorized, if demanded, in trials before a justice of the peace (5587—5602, C. C. 9208—9223) and in criminal actions, other than for the violation of city ordinances, tried in a municipal court (C. C. 6865). The trial shall be without jury, saving to the defendant the right to appeal to the district court, in criminal proceedings before a mayor or a police court (692, C. C. 3588) in a municipal court for violation of a city ordinance (C. C. 6865) or in a superior court (C. C. 6918: in criminal procedure the superior court is really an inferior court).

The jury consists of six in trials before justices of the peace (5596, C. C. 9217) and in municipal courts (6883: in certain civil actions in municipal courts a jury of twelve may be requested, ibid. and see 6859).

One writer[5] has said of the right of trial by jury, that "it is often erroneously supposed that it was secured by Magna Charta", adding in a note that " 'the judgment of his peers' there named is secured only to noblemen who are, by this provision, to be tried at the King's suit in the House of Lords." But when we have shown that this protection was quite limited in its inception and has since broadened in its scope so as to include all people, we seem rather to have explained than to have contradicted the thought that this important benefit dates back to that great document.

STATE *v.* KAUFMAN

Supreme Court of Iowa, 1879. 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148.

During a trial for uttering and publishing a forged note with intent to defraud, one of the jurors became ill. The defendant then consented that this juror should be discharged and the trial be continued before the remaining eleven jurors. This having been done by order of the court upon the consent thus given, and a verdict of guilty having been brought in, the defendant filed motions in arrest of judgment and for a new trial, on the ground that no legal judgment could be rendered on such a verdict. Both motions were overruled and judgment entered, whereupon the defendant appealed.

SEEVERS, J. I. It is provided by statute that "the jury consists of twelve men, accepted and sworn to try the issue. All qualified electors of the State . . . . are competent jurors in their respective counties." Code, §§ 227, 4397. Both these statutory

[5] Beale's Criminal Pleading and Practice 253.

provisions have equal force. If one can be waived, so may the other. It was said in *The State v. Groome*, 10 Iowa, 308: "If the defendant knew, at the time the jury was sworn, that any of them were not qualified to act as jurors, he would have waived his right to object thereafter." This decision was made under the Code of 1851, but section 1630 and 2971 thereof are precisely the same as sections 227 and 4397 of the Code. That a defendant in a criminal action, by silence, may waive the benefit of a statutory provision was clearly recognized.

There are several other decisions which recognize the same principle. *Hughes v. The State*, 4 Iowa, 554; *The State v. Ostrander*, 18 Id., 435; *The State* v. *Reid*, 20 Id., 413, and *The State* v. *Felter*, 25 Id., 67. It must, therefore, be regarded as the settled doctrine in this state that a defendant in a criminal action, with the consent of the State and court, may waive a statute enacted for his benefit.

II. The Constitution provided that "the right of trial by jury shall remain inviolate, ... but no person shall be deprived of life, liberty or property without due process of law." Article 1, § 9, Code, 770. That the jury contemplated by the foregoing provision should consist of twelve competent persons, will be conceded. The question for determination is whether a defendant in a criminal action, with the consent of the State and court, can waive the foregoing constitutional provision and is bound thereby. The first impression would be, we think, that a constitutional provision could be waived as well as a statute. Both, in this respect, have equal force, and were enacted for the benefit and protection of persons charged with crime. If one can be waived, why not the other? A conviction can only be legally obtained in a criminal action upon competent evidence; yet, if the defendant fails at the proper time to object to such as is incompetent, he cannot afterward do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that "the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law." The same thought is otherwise expressed by Blackstone, vol. 4, p. 189, that "the king has an interest in the preservation of all his subjects."

It matters not whether the defendant is, in fact, guilty; the

plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was the best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule. It may be said that if one juror may be dispensed with, so may all but one, or that such trial may be waived altogether, and the trial had to the court. This does not necessarily follow. It will be time enough to determine such questions when they arise. Certain it is that the right to dispense with one or more jurors cannot be exercised without the consent of the court and State, and it may safely, we think, be left to them as to when or to what extent it may be exercised. We, however, may remark, without committing ourselves thereto, that it is difficult to see why a defendant may not, with the consent of the court and State, elect to be tried by the court. Should such become the established rule, many changes of venue, based on the prejudice of inhabitants of the county against the defendant, might be obviated.

The authorities are not in accord on the question under discussion. The foregoing views are sustained by *Commonwealth v. Daily et al.*, 12 Cush., 80; *Murphy v. Commonwealth*, 1 Met. (Ky.), 365; *Tyra v. Same*, 2 Id., 1. The crime charged in these cases was a misdemeanor, but in the first case this fact possessed no significance. The ruling is based on principle applicable to all criminal actions. We are unable to see how it is possible to draw a distinction in this respect between misdemeanors and felonies, because the Constitution does not recognize any such distinction.

The contrary conclusion was reached in *Cancemi v. The People*, 18 N. Y., 128; *Allen v. The State*, 54 Ind., 461; and *Bell v. The State*, 44 Ala., 393. In neither of these cases was the question large-

ly considered. Substantially, they all seem based on the thought that "it would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the Constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and, we think, ought not to be tolerated." *Cancemi v. The People,* before cited. This would have been much more convincing and satisfactory if we had been informed why it would be "highly dangerous," and should "not be tolerated," or, at least, something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used.

In *Bullard v. The State,* 38 Texas, 504, the verdict was rendered by thirteen jurors. It was set aside. But it does not appear whether or not the defendant had any knowledge until after verdict there was that number of jurors.

In *Williams et al.* v. *The State,* 12 Ohio St., 622, a jury trial was waived, and the defendants found guilty by the court. On appeal the Attorney General submitted to a reversal on the ground that a jury trial could not be waived. The case was disposed of by the court in a single line, by saying such was the opinion of the court. It is evident the case was not very elaborately considered.

The following cases hold that a trial by jury cannot be waived and the same take place before the court. .*Bond v. The State,* 17 Ark., 290; *The People v. Smith,* 3 Mich., 193; *League v. The State,* 36 Md., 269.

The Constitution of this State provides that "in all criminal prosecutions . . . . the accused shall have the right . . . . to be confronted with the witnesses against him." Article 1, § 10, Code, 770. In *The State v. Polson,* 29 Iowa, 133, "it was agreed in open court between the District Attorney and counsel of defendant, in the presence of the defendant and of the jury, that in order to save time and facilitate the trial of the cause the testimony taken upon the former trial should be read to the jury as a substitute for the oral testimony of the witnesses in court." A conviction followed, which was held to be right, and that the constitutional provision was a personal right and in no manner affected the jurisdiction of the court, and that it might be waived.

This decision in principle is identical with the case at bar. If

one constitutional provision may be waived, why not another? The one is no more binding and obligatory than the other. Both are equally important.

III. No exceptions were taken to the instructions, but in the motion for a new trial it was objected that the verdict was not supported by the evidence. If the jury believed the witness Collins, and they must have done so, the conviction was undoubtedly right. Both the District Court and jury have passed on the sufficiency of the evidence, and the story told by Collins is not so improbable as to justify us in disbelieving him.

Certain objections were made on the trial to the admission of evidence. These are not pressed in argument of counsel. But as is our duty, we have examined them, and fail to find they, or any of them, are well taken.

Affirmed.

STATE *v.* REA

Supreme Court of Iowa, 1904. 126 Iowa 65, 101 N. W. 507.

Per Curiam.— This case has been submitted upon a transcript of the record in the court below and without arguments of counsel. It appears that the defendant was indicted by the grand jury of Emmett county upon the charge of doing business as an itinerant physician without having procured a license for that purpose, contrary to the provisions of Code, section 2581. Defendant demurred to this indictment on the ground that the statute referred to is unconstitutional so far, at least, as it applies to one who has been duly admitted to the practice of medicine under the laws of the State. The demurrer was overruled, and defendant entered a plea of not guilty. Thereupon, as the record recites, the parties agreed and consented to waive a jury, and to submit the cause to the court for its judgment upon an agreed statement of the facts. Trial was accordingly had to the court without a jury, and the defendant found guilty, and adjudged to pay a fine of $300 and costs. The defendant has appealed from the judgment against him, and, although neither party has thought it worth while to favor this court with an argument, we are not at liberty, as we would be under like conditions in a civil action, to dismiss the appeal, but must inspect the record, and ascertain whether it shows any manifest error in the proceedings. As far back as the case of *State v. Carman,* 63 Iowa, 132, it was decided that the defendant in a criminal case cannot waive a jury or consent to trial by the court, and that judgment thus procured will be reversed on appeal.

The substance of the holding there is that the court is wholly without jurisdiction to hear or try an issue of fact in a criminal case without the aid of a jury, and that the consent or waiver of the defendant does not estop him from taking advantage of the error. That case has since been followed and approved in *State v. Larrigan,* 66 Iowa, 426; *State v. Tucker,* 96 Iowa, 276; *State v. Douglas,* 96 Iowa, 308; *State v. Lightfoot,* 107 Iowa, 351. The provisions of our State Constitution (article 1, section 10) and of the statute (Code, section 5338) which were then deemed controlling of the question remain unchanged, and, while the decisions which we have cited were rendered by a divided court, the doctrine has been so long adhered to, and its propriety is so apparent, that we are not ready to approve the innovation.

The judgment of the district court is *reversed.*

STATE *v.* ILL

Supreme Court of Iowa, 1888. 74 Iowa 441, 38 N. W. 143.

"The defendant was tried by a jury in a justice's court on an information which charged him with having owned and kept intoxicating liquors, with intent to sell the same contrary to law. He was convicted and adjudged to pay a fine. From that judgment he appealed. In the district court he consented to a trial without a jury, and was again convicted; and, from the judgment rendered, appeals to this court."

ROBINSON, J.—The only question presented by this appeal is the power of the defendant to waive his right to a trial by jury in the district court. It is contended by appellant that such right did not exist, and that this case falls within the rule announced in *State v. Carman,* 63 Iowa, 130, and *State v. Larrigan,* 66 Iowa, 426. In each of those cases the defendant was tried on an indictment, and it was held that section 4350 of the Code was an imperative provision, which excluded the jurisdiction of the court, without a jury, to try an issue of fact presented by indictment. In this case, defendant was accused, by information, of an offense of which the district court had only appellate jurisdiction. Section 4702 of the Code provides that a case of this kind "shall stand for trial anew in the district court in the same manner as it should have been tried before the justice." It should have been tried before the justice in one of two modes: either by the court or by a jury. The provisions of the Code which apply in this case are as follows: "Sec. 4669. Upon a plea other than a plea of guilty, if the defendant does not demand a trial by jury, the justice must proceed to

try the issue, unless a change of venue be applied for by defendant." "Sec. 4672. Before the justice has heard any testimony upon the trial, the defendant may demand a trial by jury." It will be noticed that the proper manner of trying a case of this kind in justice's court is to try it to the justice, unless a jury is demanded by defendant. In other words, if he fail to demand a jury, he waives the right to be tried by one. This being the case in justice's court and the cause being triable in the same mode or manner in the district court, the defendant had the power to consent to a trial to the court. He was not denied the right to a trial by jury, and cannot now be heard to complain that he was not so tried.

Affirmed.

SECTION 4

OTHER RIGHTS

The defendant has also a right "to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel" (Constitution of Iowa, Article 1, §10).

Some of these rights are less ancient than the others we have discussed. Thus "it is a remarkable circumstance, that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little oportunity of discovering them. At common law, he is never, in case of treason or felony, entitled to a copy of the indictment; though, if any legal exception be taken to its form, the court will, as a favor, allow a copy to be taken of the part which it is material to examine. And he is, in all cases, allowed to have the record read over to him with sufficient distinctness, or even twice in English; as is the case at the present day where the prisoner desires to plead autrefois acquit to an indictment for felony. And in a case where the defendant's object was to reverse an outlawry before conviction for murder, the record of outlawry was read so slow as to afford an opportunity of taking it down in short-hand. In offenses inferior to felony, on the other hand, it seems that the right of having a copy of the indictment has at all times been admitted. And now, by 60 Geo. 3, and 1 Geo. c. 4, s. 8, in prosecutions for misdemeanors, instituted by the attorney or solicitor-general, in any of the courts therein mentioned, the court shall, if required, make

order that a copy of the information or indictment shall be delivered, after appearance, to the party prosecuted, or his clerk in court, or attorney, upon application made for the same, free from all expense to the party so applying; provided that such party, or his clerk in court, or attorney, shall not have previously received a copy thereof.[1]

"It seems to be universally agreed, that at common law, a prisoner was not entitled to defend by *counsel,* upon the general issue not guilty, on any indictment for treason or felony. This rule may appear somewhat strict and severe, as the crown has always the benefit of counsel to marshall its evidence, and state the case to the jury: but it is, in some degree, attempted to be explained by the maxim, that the judge is to be counsel for the prisoner; whose duty it is to see that all the proceedings are regular; to examine witnesses for the defendant; to advise him for his benefit; to hear his defense with patience; and in general, to take care that he is neither irregularly nor unjustly convicted. Whereas, when counsel are allowed a prisoner, it is their business to see that he lose no advantage; and it is then the duty of the judge to be equal and indifferent between the king and the prisoner. In prosecutions in which counsel may be and are allowed, the court will not be of counsel for the defendant also. The rule by which counsel are refused to the defendant, applies only to *matters of fact;* for whenever a point of *law* arises proper to be debated, he will have counsel to discuss it; as whether the facts proved constitute any offence, or the offence charged; whether the witnesses offered are competent; whether the jury are sufficient, and whether the indictment is properly framed. In these cases, it is said, the prisoner must propose the point and the court will assign him counsel if they think it will bear discussion. But if any doubt arises on the trial of a nobleman by his peers, it is said, they will not allow counsel, but decide the matter among themselves.[2]

" If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel, and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours" (5313, C. C. 9374) and who shall be paid by the county (5314, C. C. 9375).

---

[1] I Chitty's Criminal Law 403.

[2] I Chitty's Criminal Law 407.

CHAPTER X

THE TRIAL JURY

SECTION 1

THE PANEL

The trial jury, or petit jury as it was called originally, is a body of laymen selected to be the judges of the truth of the facts at issue in the trial of a case. "All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write and read the English language are competent jurors in their respective counties" (C. C. 6989, 9417), but certain persons are exempt from liability to act as such (C. C. 6990) and others may be excused under specified circumstances (C. C. 6991). From jury lists which have been prepared (C. C. 6992–7000 and 7017–7021) and filed with the county auditor (C. C. 7001 and 7022). Separate ballots are prepared by the auditor and the clerk of the court upon which are written the names and places of residence of all persons selected for grand and petit jurors and talesmen (C. C. 7002 and 7023). The ballots containing the names of the grand and petit jurors, and talesmen, are deposited in separate boxes which are plainly marked, so as to show the class of jurors whose names are contained therein, which boxes are then sealed and deposited with the clerk of the court (Ibid.). From the box containing the ballots of petit jurors a new panel is chosen for each term of court by a chance drawing therefrom of twenty-four names (C. C. 7004, 7005, 7009, 7024) unless the court or judge otherwise orders a greater or less number" (C. C. 7009, and see 7011 and 7030). The clerk of the court then issues his precept to the sheriff of the county, commanding him to summon the persons so drawn to appear at the courthouse at the time designated on such precept (C. C. 7005 and 7025). "Unless the court or judge otherwise orders, jurors shall be summoned to appear at each place where court is to be held at ten o'clock A. M. of the second day of the term, at which time they shall be called, and all excuses shall be heard and determined by the court" (C. C. 7008). A juror who has been so summoned and

has failed to appear may be punished for contempt unless he has sufficient excuse (Ibid.).

This list of persons is known as the "panel" from the sheriff's panel or parchment roll upon which the names of the jurors were written. Any insufficiency in the panel is made up by an additional drawing from the box of petit jurors (C. C. 7010, 7027, 7028). Should the panel become exhausted upon the trial of any cause, names are drawn from the "talesmen box" (C. C. 7012) which is prepared for that purpose (C. C. 6992–7002, 7005, 7017–7024. For the selection and drawing of trial jurors in inferior courts see C. C. 9209–9214 (justice of the peace) and C. C. 6870–6881 (municipal court). The panel sometimes is referred to as the "array"; and the word "panel" has been used at times to designate the jurors selected by lot from the panel proper.[1]

SECTION II

"IMPANELED AND SWORN"

"The word *impaneled* means the final formation by the court, of the jury. It is the act that precedes the swearing of the jury, and which ascertains who are to be sworn"[1]. Thus while the word "impanel" originally meant the entering upon the panel or parchment roll of the names which were to constitute the jury list or "panel"— that is, meant the formation of the panel — now it refers to the selection from the panel of those jurors who are to constitute the jury in the trial of a particular cause.

We have seen that the method of forming the panel from the jury list is by the chance drawing of ballots from a box. The method of drawing jurors from the panel is the same (3694-3698, 5356, 5357, C. C. 7489-7494, 9417, 9418), sixteen names being drawn by the clerk from the ballot box (5356, 3695 and 3676, C. C. 9417, 9470, 9471) for the *voir dire*. The *voir dire*—"to speak the truth" —is the name given to the examination by counsel of the persons thus drawn, to test their qualifications and acceptability as jurors. Since the purpose of the *voir dire* is to enable counsel to determine the presence or absence not only of grounds for challenge for cause but also of reasons for peremptory challenge, wide latitude is allowed as to the nature of questions that may be asked.[2] But such a question as "would the fact that the defendant ran away

[1] *State* v. *Gurlagh* (1888), 76 Iowa 141, 40 N. W. 141.

[1] *State* v. *Ostrander* (1865), 18 Iowa 435, 446.

[2] *State* v. *Dooley* (1894), 89 Iowa 584, 57 N. W. 414.

after the shooting prejudice your mind in any way?'' is subject to objection because ''to test the qualifications of persons called to sit as jurors, neither party may inquire concerning his views of evidence to be adduced on the trial, or the weight he would be inclined to attach thereto. These are matters on which the jurors are to act under the guidance of the court''[3].

''A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel.

2. To an individual juror'' (5358, 3677, C. C. 9419, 7472). ''A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury'' (5358, 3677); it ''must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge'' (3680, C. C. 7475): no challenge to the panel is allowed in the trial of non-indictable offenses before a justice of the peace—5594, C. C. 9215). ''A challenge to an individual juror is an objection which may be taken orally, and is either for cause or peremptory'' (5359, C. C. 9420). A challenge for cause may be made by the state of defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes:

1. A previous conviction of the juror of a felony;

2. A want of any of the qualifications prescribed by statute to render a person a competent juror;

3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body as render him incapable of performing the duties of a juror;

4. Affinity or consanguinity, within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;

5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or in his employ on wages;

---

[3] *State* v. *Dillman* (1918), 183 Iowa 1147, 1152, 168 N. W. 204, and see *State* v. *Arnold* (1861), 12 Iowa 479.

6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against or accused by him in a criminal prosecution;

7. Having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

8. Having served on a trial jury which has tried another defendant for the offense charged in the indictment;

9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict after the cause was submitted to it;

10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;

11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;

12. Because of his being bail for any defendant in the indictment;

13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;

14. Because he is, or within a year preceding has been, engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where the defendant is indicted for a like offense;

15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury." (5360, C. C. 9421, and see C. C. — 7021; in the trial of non-indictable offenses before a justice of the peace "the same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor"—5594, C. C. 9215)." The state shall first complete its challenge for cause and the defendant afterwards until sixteen jurors have been obtained against whom no cause of challenge has been found to exist" (C. C. 9424). Then the parties, beginning with the state, alternately challenge peremptorily or waive such challenge until the peremptory challenges are exhausted (C. C. 9427). After each challenge sustained for cause or made peremptorily another juror is called and examined on *voire dire* (C. C. 9428). If the offense is punishable with death or imprisonment for life each party may peremptorily challenge eight jurors. Four may be challenged by each if the offense charged is any other felony, and two, if it is a misdemeanor (C. C. 9427). A

waiver of peremptory challenge simply counts as one of such challenges to which such party is entitled and he may use any remaining right of challenge to which he is entitled, "even as to a juror in the box when the waiver was made".[4]

After the peremptory challenges are exhausted, if there is no challenge for cause to the juror who replaced the last one challenged peremptorily (C. C. 9428), each party strikes two names from the list of the sixteen remaining (C. C. 9427). The twelve jurors thus selected are sworn to try the issues (5369, C. C. 9430). For this oath no special form is prescribed by the Code.

TRIMBLE *v.* STATE

Supreme Court of Iowa, 1850. 2 G. Greene 404.

Opinion by WILLIAMS, C. J.— Alexander Trimble was indicted at the September term of the district court at Keokuk, in Lee county, A. D. 1849, for the murder of Richard Wells. He was found guilty of manslaughter by the jury, and sentenced by the court upon the verdict to pay a fine of $1000, to undergo confinement in the penitentiary for the term of three years, and to pay the costs of prosecution. When the cause was called for trial, the counsel for the prisoner made three challenges to the array of grand and petit jurors respectively. The challenges were overruled by the court. Having proceeded with the trial so as to call several petit jurors to the box, upon examination as to their legal qualification to sit as jurors in the case, they were challenged by the prisoner for cause. The challenge was overruled, and the jurors were sworn, and participated in making and rendering the verdict, upon which the judgment and sentence of the court were pronounced. Motions in arrest of judgment and for a new trial were made, and overruled by the court, before judgment and sentence.

The following are the principle assignments of error, which are relied on as ground of reversal:—

1. The court erred in overruling the prisoner's challenges to the array of grand and petit jurors who found the indictment and tried the cause; the venue for summoning both being illegal.

2. The court erred in not allowing defendant's challenges for cause of jurors who had each formed and expressed an opinion as to the guilt or innocence of the prisoner.

. . . .

But it is contended for the accused, that the court erred in not

[4] *State* v. *Hunter* (1902), 118 Iowa 686, 92 N. W. 872.

allowing his challenge for cause to jurors who had formed and expressed an opinion.

The bill of exceptions shows, that on proceeding to trial several jurors were called to the box, who, being sworn to answer questions touching their qualifications as jurors, answered that they had *formed* and *expressed* an opinion as to the guilt or innocence of the prisoner, whereupon the prosecuting attorney having refused to challenge them, they were challenged for cause by the prisoner's counsel, and requested to leave the box. Whereupon the court interposed, saying that it was improper to make challenges in that way, and ordered the clerk to call the jurors singly, which being done, Peyton Dawson, one of the jurors called, stated "that he had formed and expressed an opinion from the rumor or report he had heard in his neighborhood, soon after the murder was committed; that he had no acquaintance with the defendant, no ill-will or prejudice against him; that he had no personal knowledge of the circumstances of the case; that he had never heard any of the testimony or conversed with any of the witnesses; that his opinion was conditional; that if what he had heard was true, he had formed an opinion; if what he had heard was not true, he had formed none." Six other jurors being examined made the same statement. After this examination by the court, the counsel for the prisoner still urged his right to challenge the jurors for cause. The court overruled the challenge, and decided that the jurors were competent. Whereupon they were sworn in the case, and participated in making the verdict.

To this action of the court, the counsel for the prisoner excepted.

The right of the accused "to a speedy trial by an impartial jury," is secured by the constitution. It is therefore important in this case to ascertain from the record whether the jurors to whom the prisoner objected were "impartial" in the proper legal sense. By examining the origin of the trial by jury, and tracing its history through the progression of civil and political advancement, to the enlightened spirit which pervades civilization at the present day, we find that reason directed by truth has done much to render it a shield to the citizen against tyranny and oppression; whilst by it, the observance of law and justice are enforced. It has kept pace with the progression of political liberty. In England, during the reigns of James I. and Queen Anne, it was questioned whether an offender charged with a capital felony was entitled to examine witnesses on oath in his favor. In the seventh year of the reign of William III., witnesses were first allowed to prisoners on trials

in certain cases. In the first year of Queen Anne, the right was extended to all cases of treason and felony. 4 Black. Com., 360.

Counsel was not allowed to the prisoner in case of high treason till the seventh of William III. It is a feature of English jurisprudence now, that where a man is indicted for a capital felony, he is not allowed counsel on the question of guilty or not guilty. But strange as these facts may seem to us in the United States at this day, they are scarcely more so, when properly considered, than that at this period of the world, the English judiciary should declare that a juror who had formed and expressed an opinion against a prisoner at the bar for trial, should not be challenged for that cause. In that country, and others similarly constituted in government, where kingly power still is struggling against the light of justice, and the liberty and equality of man as a citizen; where the government is enthroned above and against the people, and made by law independent of their will, such a doctrine might not seem strange. In this country, however, such is the spirit of our national and state constitutions and our statutes, that the citizen stands for security on a higher and more certain position to maintain his rights when arraigned before his country's tribunal. In this country, the protection and elevation of the citizen is the strength and security of the government.

In disposing of the question before us, we will then be governed by the light of American decisions, which best accord with the spirit of our constitution. Then, is it good cause for a principal challenge to a juror, in a capital case, that he has *formed* and *expressed* an opinion as to the guilt or innocence of a prisoner on trial, when that opinion has been formed on facts gathered from rumor, and believed by him so as to bring his mind to a conclusion on the subject? In the case of *The People v. Vermelyea,* 7 Cowen, 121, the learned judge who delivered the opinion of the court says: "It is admitted that every citizen whether arraigned for crime or impleaded in a civil action is entitled to a trial by a fair and impartial jury. The trial by jury is justly considered an invaluable privilege, but it would become a mockery if persons who had prejudged the case were admitted as impartial triers. All the elementary writers with the exception of Chitty lay down the proposition broadly, that if a juror has declared his opinion beforehand, it is a good cause of challenge. 1st. Archbold, 181, 182. 2d. Tidd, 779, 780. Bacon, (title Juries E.,) 5. Bull, N. P., 307. Lord Coke (1 Com. on Lit., 155, 156) says: "He ought to be least suspicious, that is, to be indifferent, as he stands unsworn, and then

he is accounted in law *liber et legalis homo:* otherwise he may be challenged and not suffered to be sworn," and he proceeds to consider what is meant by standing *indifferent:* "manifestly that the mind is in a state of neutrality as respects the person and matter to be tried; that there exists no bias for or against either party in the mind of the juror calculated to operate on him; that he comes to the trial with a mind uncommitted, and prepared to weigh the evidence in impartial scales." In the case cited, it is true that the opinion of Norwood, the juror, was formed from hearing the testimony on a former trial, not from rumor, as in the case at bar. But the ground upon which he was held to be incompetent by the supreme court was, that "he stated that, if the evidence on the second trial should be the same as on the first, he should pronounce them guilty." The point is this, that the mind of the juror was so prepossessed as to the case of the prisoner by what he had heard, that a conclusion was formed, to remove which other and stronger facts and circumstances must be presented with such irresistible force as to compel him to yield his position. We cannot perceive much difference between a juror who has formed an opinion from the hearing of the evidence of a former trial, and one who has formed it from a recital of the circumstances of the case as established by rumor. In both cases the facts are heard and believed, the mind prepossessed, and an opinion formed against the accused so conclusively, that it is expressed and published abroad. A man of firmness and decision of character, who has thus brought his mind to a conclusion, and expressed his opinion upon the facts of a case when not sworn as a juror, will not be likely to change that opinion when acting under oath, unless the evidence adduced on trial be so entirely different from the facts by him learned and acted upon, that he will be forced to it. Can such a juror be *"impartial"* in the sense of the constitution? Is he more open to conviction, less biased, and better prepared in mind to hear, weigh and fairly determine upon the case anew, than the man who stood by a former hearing, and heard the evidence? In view of the constitutional right of the accused, and of sound reason, if the one be incompetent to act as a juror, the other is also.

The courts have in this country decided that a juror who had tried a cause once would be incompetent to act as such upon a second trial. 1 G. Greene, 534.

Upon a review of the various decisions upon this and assimilated points, we hold it to be a good ground of challenge for cause to a

juror, that he has formed and expressed an opinion on the question in controversy between the parties to a suit. In cases capitally criminal, this principle should be the more strictly observed. *Blake v. Millspaugh,* 1 John., 316; *Pringle v. Hughes,* 1 Cowen, 432; *Commonwealth v. Knapp,* 9 Pick., 499; *The People v. Rathbun,* 21 Wend., 542; *The Commonwealth v. Ruggell,* 16 Pick., 153; *The People v. Bodine,* 1 Denio, 281.

Much reliance is placed on the fact that the juror, after stating that he had formed and expressed an opinion upon being examined further by the court, added, "that if what he had heard was true, he had formed an opinion; if what he had heard was not true, he had formed none." It is urged that his opinion was merely hypothetical; and this being the fact, that he stood indifferent. We are aware that decisions to this effect have been made by courts entitled to high respect. But none of these cases will meet the one at bar. Here the juror had expressed a positive opinion. It does not appear to have been hypothetically expressed. That expression must have been based upon an opinion previously formed. This explanation merely amounts to a qualification, which all will admit who have formed opinions upon what they have heard; that is, if what they have heard should not prove true, their opinions might be changed. The juror who has previously formed and expressed an opinion upon the merits of the case, cannot, when he enters the box, stand there indifferent, though that opinion be conditional or hypothetical. It is clear that the task of removing his mental bias must devolve upon the party against whom it exists. He is not free and uncommitted. An unconstitutional, unreasonable and therefore illegal condition, is imposed upon the party whose case has been thus prejudged. He must labor under a burden from which his adversary is free. This is at variance with the spirit of our institutions.

The allegation of inconvenience to judicial procedure in the procurement of jurors in cases like this, where the public mind becomes excited, insomuch that the minds of citizens are liable to be affected by rumor, cannot be received as a reason for dispensing with the observance of a right secured and made sacred by the constitution, and which is of vital importance to the citizen. They who are in this day of civil and religious light and liberty called to make and execute the law, should not turn back to minister to the improprieties of mankind, but rather to hold the standard of the constitution and the law up to its true elevation, that the citizen may see it and be raised to it.

If difficulty should occur in the procurement of jurors who will stand on trial indifferent or impartial, the law has wisely provided for such a case, by allowing a change of venue.

Judgment reversed.

STATE *v.* HASSAN

Supreme Court of Iowa, 1910. 149 Iowa 518, 128 N. W. 960.

The defendants appealed from a judgment of conviction of murder in the second degree.

DEEMER, C. J. . . . .

IV. One Linberg was called as a trial juror, and examined as to his qualifications. It appeared that the juror had formed an opinion from what he had heard as to the defendants' guilt or innocence, and that he still had that opinion. The juror also testified as follows: "I think I could try this case from the evidence alone and render a fair and impartial verdict regardless of the opinion that I have already formed. My opinion would not prevent me from trying this case alone on the evidence and render a fair and impartial verdict. If accepted as a juror I will do so. I do not believe that the opinion that I have will enter into my deliberations. I can tell when I hear the evidence. I can try this case upon evidence alone, and reach a fair and impartial decision regardless of my opinion that I have formed previous to this time or have now." Under the rule announced in *State* v. *Ormiston,* 66 Iowa, 143; *State* v. *Ralston,* 139 Iowa, 44; *State* v. *Rohn,* 140 Iowa, 640, and other like cases, there was no error in overruling the challenge to the juror. The ruling was discretionary in any event, and no abuse of that discretion appears. *State v. Smith,* 124 Iowa, 334; *State* v. *Brown,* 130 Iowa, 57. The juror did not sit on the trial of the case, but as defendant exhausted all of his peremptory challenges doubtless the error, had there been one, would have been ground for a reversal.

. . . . . .

Affirmed.

SECTION III

CUSTODY, CONDUCT AND DELIBERATIONS OF THE JURY

The fact that a man's name is on the jury list makes him a potential juror but does not place him under any present responsibility. When the panel is summoned to appear at court those

who were drawn on that panel have received their call to duty; and when they appear in response thereto they are on duty. This duty, however, requires no more of each than that he keep himself in readiness to sit upon any jury to which he may be drawn. Only when the jurors have been impaneled and sworn for the trial of a particular cause, is there assumed that grave responsibility that we commonly associate with the thought of jury duty. From this time they are within the custody of the law. And while the court, if neither party objects thereto, may permit the jurors to separate, this is a matter of judicial discretion and the court may order the jurors to be kept together in charge of proper officers even though this is not insisted upon by either party (5382, C. C. 9441). In such event "the officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak or communicate with them on any subject connected with the trial, nor to do so themselves, and to return them into court at the time to which it adjourns" (Ibid.). Whether permitted to separate or not the jury must be admonished by the court not to permit any one to discuss with them any subject connected with the trial, nor to converse thereon among themselves (5383, C. C. 9442). Except when permitted to separate during adjournments of the court, the jurors, from the time they are sworn until the verdict is rendered, are to be either in open court or in charge of proper officers.

The circumstances of some trials are such that the jury, in order to be able to render a proper verdict, should have an opportunity to view the place in which the offense is charged to have been committed. Whenever the court is of the opinion that this should be done, it may order the jury to be conducted to such place in custody of proper officers, sworn to suffer no person to speak to or communicate with the jury on any subject connected with the trial except that the person appointed by the court for that purpose may say what is necessary to show the place to be viewed (5380, C. C. 9438).

"If a juror has personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial, and if, during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court, and the juror must be sworn as a witness and examined in the presence of the parties, if his evidence be admissible" (5381, C. C. 9439).

When the case is ready for the verdict of the jury they may

either decide in court or retire for deliberation (5387, C. C. 9455). If they retire for deliberation it is then too late for the court to permit them to separate until a verdict has been rendered (5382, 5387, C. C. 9441, 9455); but the mere fact that one of the jurors left the jury room momentarily "for a necessary and proper purpose" accompanied by a deputy sheriff with whom he had no conversation other than that of asking permission to retire, is not a ground for reversal.[1]

The officers in whose charge the jury is placed during their deliberation, are sworn "to keep them together in some private and convenient place without food or drink, water excepted, unless directed by the court"; not to permit any one to communicate with them nor to "communicate with them themselves except to ask them whether they have agreed upon a verdict"; not to communicate to any one the state of their deliberations; and to return them into court when they have agreed upon their verdict (5387, C. C. 9455).

"Upon retiring for deliberation, the jury may take with it all papers which have been received in evidence, except depositions, and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession, also any notes of the testimony or other proceedings taken in the trial by themselves or any of them" (5397, C. C. 9482). If there is any disagreement on any part of the testimony, or any need for further instructions on any part of the law, the jury may require the officer in charge to conduct it to the court room where "the information required must be given as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel" (5398, C. C. 9483).

After retirement, the jury cannot be discharged until it has agreed upon its verdict and rendered it in open court, unless sickness or accident prevents the completion of their deliberation, or the consent of both parties to the discharge is entered upon the record, "or unless, at the expiration of such time as the court shall deem proper, it satisfactorily appears that there is no reasonable probability that it can agree" (5399, C. C. 9484). The cause may be tried again at the same or another term of court if the jury is discharged for any such reason (5400, C. C. 9485). (The instructions given to the jury and the verdict will receive consideration elsewhere).

[1] *State* v. *Bowman* (1877), 45 Iowa 418.

STATE *v.* RAINSBARGER

Supreme Court of Iowa, 1887. 74 Iowa 196, 37 N. W. 153.

Having been convicted of murder, the defendant appealed.

BECK, J. . . . .

IV. After the jury were impaneled, the defendant asked that they be placed in the care of the officers, and that they should not be permitted to separate. The ground of this request was that, at a prior trial of one indicted for the same homicide, a daily newspaper, published in the city where the court was held, had commented on the evidence in a manner prejudicial to defendant, and a repetition thereof was feared. The request was refused. This court has held, under the statute now in force applicable to the question (Code, sec. 4434),[1] that the court, in the exercise of its discretion, may, in a case of the character of the one before us, permit the jury to separate under proper direction and admonition. *State* v. *Felter,* 25 Iowa 67. The record fails to show abuse of discretion by the district court, or prejudice resulting to defendant from the refusal to grant his request. The court carefully, at proper times, admonished the jury not to read the newspaper accounts and discussion of the trial, and to observe other directions intended to guard them from influences which might have the effect to bias their minds. It is not shown that the jury disregarded these admonitions, or that any prejudice did result, or could have resulted, to defendant, from the action of the court in denying defendant's request.

. . . . . .

Affirmed.

STATE *v.* GIUDICE

Supreme Court of Iowa, 1915. 170 Iowa 731, 153 N. W. 336.

The defendant appealed from a judgment of conviction of murder in the first degree.

LADD, J. . . . .

V. After the trial had begun and several witnesses examined, the court, in the presence of the jury, remarked: "There has been a request that the jury be kept together during the trial of this case."

---

[1] The Code section referred to, 4434 of the Code of '73, was as follows: "The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers" who must be sworn, etc.

Mr. Ware (counsel for the state): "It didn't come from the state."

Court: "That is a request that must be granted when made under the statute. It is not a matter of discretion with the court."

The court then ordered the jury to be kept together. Thereupon a juror said:

"Your Honor, it will cause me severe trouble in my business, to be locked up, for the present moment; I ask that whoever made that motion withdraw it."

Court: "What was it that you want to attend to?"

Juror: "I want to see to the running of the farm."

Capell (County Attorney): "The state will consent to that, we do not ask to put them out."

Court: "The request to keep the jury together has been withdrawn and the order will be vacated and cancelled."

The statute permits the separation of the jury at any time before the final submission of the cause to them "except where one of the parties objects thereto." Sec. 5382, Code.[2] Upon the request of either party, the jury must be kept together, and it is error not to do so. *State v. Garrity*, 98 Iowa 101; *State v. Smith*, 102 Iowa 656. This objection must be made to the court. *State v. Smith*, 107 Iowa 480. But it is the preferable practice that this be not done in presence of the jury, and that counsel avoid any allusion thereto in the presence of the jury. The presiding judge, in making the order, should assume the responsibility of so doing; for if this be cast on either party, the jury may feel resentful, and, even though the order be essential to a fair trial, the announcement by counsel that it was not at the instance of the state ought not to have been made, and the statement of the court to the jury that such a request had been made and must be granted is disapproved. But as the order was withdrawn, and the jury never confined thereunder, we are of the opinion that any possibility of prejudice was obviated. Such was the holding in *State* v. *Walton*, 92 Iowa 455.

. . . . . .

(For other reasons the judgment was-) *Reversed.*

---

[2] The code section here involved, 5382, C. C. 9441, is as follows: "The jury sworn to try an indictment, in the discretion of the court, at any time before the final submission of the cause to them, may be permitted to separate, except where one of the parties objects thereto, or to be together in charge of proper officers" who must be sworn, etc.

STATE *v.* FERTIG

Supreme Court of Iowa, 1891. 84 Iowa 79, 50 N. W. 545.

From a judgment of conviction of maintaining a nuisance by the sale of intoxicating liquors, the defendant appealed.

ROTHROCK, J.— One ground upon which it is claimed that the judgment should be reversed is founded upon alleged misconduct of the jury. It appears from the record that the court instructed the jury at about five o'clock in the afternoon, at which time the jury retired in charge of an officer to consider their verdict. After being in consultation for about three hours a verdict of guilty was agreed upon and reduced to writing, and it was signed by the foreman, and delivered to the officer who had the jury in charge. Thereupon the jury separated, and each one of the jurors went his way. The jury was under the impression, from the charge of the court, that they were authorized to seal the verdict and disperse. This was a misapprehension. There was no direction that the jury might seal the verdict and then separate. In about two hours after the dispersion of the jury the members thereof were again called together, when they brought in and rendered in open court the same verdict which had been agreed upon previous to the separation.

The question is, whether the motion for a new trial should have been sustained by reason of this irregular action of the jury. The sections of the Code pertaining to that part of the trial for a criminal offense after the submission of the case to the jury, so far as pertains to the question under consideration, are as follows:

"Sec. 4442. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, without meat or drink, water excepted, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves, unless it be to ask them whether they have agreed upon their verdict, and not to communicate to anyone the state of their deliberation or the verdict agreed upon until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission or order of the court they be sooner discharged."

"Sec. 4458. While the jury is absent the court may adjourn from time to time as to other business, but it shall be never-the-less deemed open for every purpose connected with the cause submit-

ted to the jury until a verdict be rendered or the jury is discharged."

"Sec. 4460. When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and, if all do not appear, the rest must be discharged without giving a verdict. In such case the cause may again be tried at the same or another term."

"Sec. 4462. When the jury have answered to their names, the court or clerk shall ask them whether they have agreed upon a verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same."

"Sec. 4470. When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and, if any one answer in the negative, the jury must be sent out for further deliberation."

These sections of the law were not intended as merely directory provisions. They appear to us to be absolute requirements, and we know of no reason why they may be ignored, unless their provisions are waived by the party on trial. That they must be so regarded is quite apparent from the fact that by section 4434 the jury may, at any time before final submission of the cause to them, in the discretion of the court, be permitted to separate. This provision plainly implies that no separation is permissible after the cause is submitted to the jury, unless by consent. It is contended in behalf of the state that, under the repeated decisions of this court, prejudice will not be presumed on account of this irregularity; and, in absence of a showing of prejudice, a verdict should not be set aside; and we are cited to the case of *State v. Gillick*, 10 Iowa 98. It was held in that case that it was not error to refuse to keep the jury together during the trial and before the cause was submitted to the jury. It is apparent that the rule there announced does not meet the question here presented. The case of *State v. Bowman*, 45 Iowa, 418, is also cited by the state. In that case one of the jurors, after retiring to consider the verdict, absented himself from the jury room for a short time, for a necessary purpose, accompanied by a deputy sheriff, with whom he had no conversation about the case, and it was held this did not justify the granting of a new trial.

The case of *State v. Wart,* 51 Iowa, 587, is also relied upon by the state. In that case, after the charge to the jury, and while they were on their way to the jury room, one of them separated from the others, so far as to go to the hotel where he was stopping to obtain some tobacco, but arrived at the jury room very nearly as soon as the other jurors, and before their deliberations had commenced. It was held that, without a showing of prejudice, the absence of the juror did not vitiate the verdict.

It will be observed that all that was determined in the last two cases cited was that a literal compliance with that part of section 4442 which requires the officer in charge of the jury to keep them together, is not necessary. The statute was not intended to prevent individual jurors from absenting themselves for necessary purposes. But it is apparent that this is quite a different state of facts from the breaking up and separation of the jury, and each juror going his way, and mingling with the public. It was held in *State* v. *Callahan,* 55 Iowa 364, that where the jury, without the order of the court or consent of the parties sealed up their verdict, and handed the same to the officer and separated, a new trial should have been ordered, because the defendant was thereby deprived of the right to poll the jury. It is true that in the case at bar the jury reconvened after they sealed up their verdict, and the defendant had the right to poll the jury on the verdict as it was finally returned. We think that there should be at least a substantial compliance with the provisions of the law above cited. It is a right which the law guarantees to a party charged with a crime that the jury shall not, without his consent, be permitted to separate and disperse until after they have returned a verdict, and, if they do disperse, it is his right to insist that the investigation is a mistrial. And, although the defendant was on trial in this case for a misdemeanor, the law, in so far as the deliberations of the jury and the return of the verdict are involved, as imperatively requires that the jury shall not separate without his consent as it would if he had been on trial for the gravest felony. It is to be said that the separation of the jury was the result of a misapprehension of the charge of the court, and that the court, as soon as it was ascertained, caused them to be reconvened. It was a mistrial, and, although denominated misconduct on the part of the jury, it does not appear that any wrong was intended. As

the cause must be reversed for the error above pointed out, it is unnecessary to determine other questions presented by counsel, as they are not such as will likely arise on another trial.

Reversed.

STATE *v.* CAVANAUGH

Supreme Court of Iowa, 1896. 96 Iowa 688, 68 N. W. 452.

Having been convicted of maintaining a nuisance the defendant appealed.

GRANGER, J. . . . .

II. E. D. Troxel was a member of the jury that tried the indictment. Troxel was also a witness before the grand jury, and his name was indorsed on the indictment as such. Troxel's relation to the case was known when he was accepted as a juror, and neither party asked of the juror any question concerning his qualifications to sit. After the taking of the testimony had commenced, and at the conclusion of the examination of a witness, the court said: "If any of the jurors in the trial of this case have any personal knowlege respecting the fact, in controversy in this cause, it is your duty to declare the same in open court." The juror Troxel said: "Guess that means me. I have knowledge of the case." The court then directed him to be sworn as a witness, which was done, against objections, and his testimony was taken. The complaints are that Troxel was taken from the jury box, and used as a witness, as a consequence of which the trial was proceeding to eleven jurors; that it was no part of the court's duty to admonish the juror; that the duty of declaring what he knew rested alone with the juror. The following is section 4433 of the Code: "If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and if, during the retirement of the jury, a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into the court, and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible." In the examination of the witness, the letter and spirit of the law was observed. The complaint is as to the method by which it was accomplished. The court, openly, and in a way as free from objection as could well be, repeated to the jury the requirements of the law. Had the juror, from his knowledge of the law, risen, and said to the court, "I have personal knowledge of the facts in issue in this case," we assume that no

one could question the propriety, or the legality, of his being sworn and examined. Why? Because the law so directs. The action of the court secured the same result. The jury was an integral part of the court, for the purposes of the trial, and the disclosure was a duty the court, as organized, owed to the parties. There is no force in the claim that, because the juror took the witness stand, or gave testimony, the proceeding was a trial to eleven jurors. The testimony was as much to the juror who was a witness, as to the others, and the purpose was to have all act upon sworn evidence, and evidence that was the same. It is said that Troxel's testimony was important, and that is true, for it shows the unmistakable guilt of the defendant; and it is the view from this standpoint of observation that impresses the appellant that the action of the court, if followed, will be destructive of the rights and liberties of the people and the administration of justice.

There is a complaint that the court, in its comments, when ruling on the objection to the examination of the juror, made the remark that defendant's "counsel knew that Troxel had been a witness in the former trial, involving the same facts;" and it is said that no such facts appear in the record. There is a slight misapprehension. The court's statement was, in effect, that counsel for defendant admitted that he knew Troxel had been a witness before the grand jury, "and in a former trial involving the same facts," etc. It so appears in appellant's abstract, which we take as true. Of this state of facts, there is no complaint. The verdict has abundant support in the evidence, and the judgment is

Affirmed.

CHAPTER XI

THE CONDUCT AND ORDER OF THE TRIAL

SECTION I

THE DEFENDANT

The defendant must be "present" at the trial either by representation of counsel, which is permitted in the trial of a misdemeanor, or in his own person, which is required in the trial of a felony (5338, 5403, C. C. 9440, 9495). This means that he must be present during all the trial. If it becomes necessary for the defendant, or his counsel if he is "present" by counsel in trial of a misdemeanor, to leave the court room while the trial is in progress, an adjournment should be taken until his return.

The courts were not in accord as to whether the rule at common law permitted the defendant to waive his right to be present during the trial of a felony or not. But the Code does not put it in terms of a right of the accused, stating concisely that "the defendant must be personally present at the trial" (Ibid). But the mere fact that the record does not show that the defendant was present at every stage of the trial is not enough of itself to cause a reversal. Thus if it can be seen from the record that the defendant was present at the commencement and the conclusion of the trial, his presence all of the time of the trial will be presumed unless the contrary is shown affirmatively.[1]

Unless there is a reason to fear that the defendant will attempt to escape or to do violence to others, he should be free from shackles during the actual conduct of the trial. He is still presumed to be innocent and every facility should be afforded him to establish that fact, if fact it be. Hence he is permitted to sit near his counsel, although the early English practice required him to stand inside the dock. A defendant who, not having been admitted to bail, is brought from the jail to the court room for trial, remains in custody

[1] *State v. Wood* (1864), 17 Iowa 18.

while there; and "when a defendant who has given bail appears for trial, the court may in its discretion, at any time after such appearance, order him committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly" (5396, C. C. 9453).

TURNER *v.* BARR

Supreme Court of Iowa, 1888. 75 Iowa 758, 38 N. W. 550.

The plaintiff in habeas corpus proceedings appealed from an order remanding him to the custody of the defendant.

SEEVERS, C. J. . . . .

Therefore the first three grounds upon which the plaintiff must of necessity claim the judgments are void are, that he was not present when the jury was impaneled or sworn, that he was not present during the trials, and that he was not present when judgment was rendered. Conceding that defendant had the right to be present at such times, and that it is so provided by statute, yet we feel constrained to say that his presence or absence did not affect the jurisdiction of the court, which was conferred by the indictment, the defendant's arrest thereunder, and his being at the time in the custody of the court. It will be observed that the record recites that he was arraigned, and personally pleaded not guilty; and that the record in this respect is true, as a matter of fact, is not controverted. Regarding the statements of the petition to be true, that the plaintiff was not present as stated, it will be further conceded that there was gross irregularity in the trial, and that the plaintiff was prejudiced thereby; but this could and should have been corrected by moving the district court for a new trial, and, if it was overruled, by appeal. Error, even of a gross and prejudicial character, is materially different from the question of jurisdiction and power of the court to render any judgment in a civil or criminal proceeding.

. . . . . .

Reed, J., (dissenting). In my opinion the court did not have jurisdiction to pronounce judgment against the petitioner. I say this on the assumption, of course, that the averments of the petition are true. In criminal cases, where the plea is not guilty, the court can pronounce judgment imposing the penalty of the

law only after a verdict of guilty has been found and returned by the jury. Until that has been done, there is absolutely no power in the court to impose punishment, and any judgment which the court may pronounce, or attempt to pronounce, is necessarily void. Now, a verdict is the judgment of the jury upon the fact. If the verdict has been assented to by the jury,—if it is in fact their judgment,— I admit it could not be questioned in this character of proceeding, however irregularly that judgment may have been arrived at. But the averment here is that none of the jurors, except the one selected by the court to sign the verdict, and who by direction of the court did sign it, ever assented to it, or had any opportunity to either assent to, or dissent from, the alleged finding. Can it be said that a verdict so obtained is the judgment of the jurors? Clearly not. It is the verdict of the court, but not of the jury. Suppose the court had omitted the formality of calling a jury,— for what was done in that respect was the veriest formality, — but had made up a record showing that the cause had been regularly tried to a jury, who had found the accused guilty, and had then proceeded to pronounce judgment upon the alleged verdict, would anybody contend that the judgment was of any validity, or that it might not be questioned in this character of proceeding? Yet wherein would such a proceeding differ, either in principle or effect, from the one under consideration? Or suppose, in the case of one under indictment but who had given bail, the court should, in his absence, proceed to pronounce judgment; being careful, however, to make up a record showing a trial regularly had and a verdict of guilty, is it possible that the accused could not, when an attempt should be made to enforce the judgment, question its validity in this character of proceeding? If not, he would be without remedy; for, as the judgment is regular on its face, an appeal would not avail him. If it be said that it is impossible to conceive that the courts would be guilty of such gross illegalities and irregularities, I answer that, if the case before us was merely supposititious, the same reply might be made. I had supposed that the writ of *habeas corpus* was allowed to the citizen as a means of inquiring into the legality of his imprisonment. In that proceeding the inquiry is as to the legality of the restraint, and if it can be shown, by any means, that the officer or tribunal making the order had no power or authority to make that particular

order, the petitioner is entitled to be discharged. The proceeding is not a collateral attack on a judgment, but is an inquiry as to the authority or power of the court to pronounce the judgment. Neither do I agree that the fact that the cause was not submitted to the jury, and that the jurors were not permitted to determine the question of the prisoner's guilt, cannot be shown by their testimony; for as the writing signed by the juror, who was designated by the court to sign it, was in no sense a verdict, nothing inheres in it.

STATE *v.* YOUNG

Supreme Court of Iowa, 1892. 86 Iowa 406, 53 N. W. 272.

From a judgment of conviction of the crime of nuisance, the defendant appealed.

GIVEN, J.—The record, after showing indictment, is as follows: "Defendant, having been properly arraigned on the seventeenth day of the term, in person entered his plea of not guilty; and thereafter, on the twenty-second day of this term, being the twenty-seventh day of November, 1891, this case was regularly called for trial. The defendant failing to appear in person when the case was called for trial, W. W. Cory, Esq., who had previously appeared as attorney for the defendant, withdrew his appearance before the jury were called or impaneled, and thereupon the court, in the absence of the defendant, and without any appearance in his behalf, caused the jury to be impaneled, and the defendant to be put on trial, without anyone in any manner representing him, and after he had been called by the sheriff and found to be absent; on the trial of which case the state introduced its evidence, being the testimony of the witnesses whose names were on the back of the indictment, and gave to the jury instructions in the case, of which no complaint is made; and on the twenty-seventh day of November, 1891, the jury returned into court their verdict, finding the defendant guilty of the crime of nuisance as charged in the indictment. On the twenty-eighth day of November, 1891, the day of the finding of said verdict, and being the twenty-third day of said term of court, the defendant, through his attorney, filed in said case the following motion in arrest of judgment and for a new trial, which, together with the affidavits thereto attached and the counter affidavit of C. A. Walsh, is all the evidence or other matter or thing before the court upon which it acted in ruling on said motion, to-wit.

" 'Comes now the defendant, and moves the court to set aside the verdict in this case, and grant him a new trial, and for arrest of judgment herein for the reasons below set out: *First.* Because neither at the time of the trial nor at the rendition of the verdict defendant was neither present in court in person or by attorney, nor was he at either time in custody of the court or any of its officers, as will more fully appear by the annexed affidavits, and shown by the records in this case. *Second.* Because at the time of the trial and rendition of the verdict he was absent from court, and no attorney appeared for or in his behalf. *Third.* Because the court did not at the time of the trial or rendition of the verdict have jurisdiction of the person of the defendant. *Fourth.* Because the defendant, by the trial in his absence, and without the presence of counsel, was deprived of the right of being confronted by the witnesses against him.' "

The affidavits attached show that the defendant was called before the trial, and did not answer; also that W. H. C. Jaques was informed by a friend of the defendant on the forenoon preceding the trial that he was expected to assist in the defense; that, learning that the defendant had left town, Mr. Jaques, soon after the case was called for trial, announced to the court that he was not in the case, and declined to be retained when the defendant was not present. Following the filing of the defendant's motion and these affidavits, the county attorney filed a motion to require Charles Hall, who filed said motion on behalf of the defendant, to show his authority, for appearing for defendant, Young, and, in the absence of authority, moved the court to strike the motion for a new trial from the files. Accompanying this motion is the affidavit of the county attorney, showing that Mr. Cory appeared in the case until the moment it was called for trial, when he and Mr. Jaques announced that they withdrew their appearance; that he was informed and believed that Robert Young left the county within a short time after the arraignment and an appearance was entered, and has ever since been absent, and that, in his best judgment and belief, Mr. Hall never had authority from the defendant to appear for him in the case. The record does not show any ruling upon the motion of the county attorney, but shows that the defendant's motion was overruled, and judgment entered against him of a fine of five hundred dollars and costs.

The appellant cites section 4351 of the Code, which is as follows: "If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if for a felony, he must be personally present." The appellant contends, correctly, we think, that under this statute the accused could not be tried in his absence unless he appeared by counsel. There is no question but that the accused was absent during the progress of this trial, but the contention is whether he did not appear by counsel. Mr. Cory, an attorney of the court, appeared as the defendant's counsel at all stages of the case up to the time that it was regularly called for trial. At that time he announced to the court that he withdrew his appearance for the defendant. If, under the facts as they appear from the record, Mr. Cory had a right to then withdraw his appearance for the defendant, it must be said that the defendant did not thereafter during the trial appear by counsel; but if Mr. Cory did not have the right to then withdraw his appearance, and it was so held by the court, it must be said that the defendant did "appear by counsel."

In accepting employment as attorney for the defendant, Mr. Cory assumed duties to the client and the court which he was not at liberty to disregard, except at a proper time, and in a proper manner. He owed it to the accused not to abandon his defense for any cause without informing him, and affording him an opportunity to make other provision for his defense. He owed it to the court "to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by artifice or false statement of fact or law." Code, section 211. According to this record, Mr. Cory, who had appeared at all stages of the case at the time it was regularly called for trial, with knowledge of the defendant's absence, and that the trial could not proceed unless the defendant appeared by counsel, without giving any reason therefor, and without saying that it was with the knowledge or consent of his client, and without making any request or demand for the protection of the accused, announced to the court that he withdrew his appearance for the defendant. We are inclined to the view that when a withdrawal of counsel theretofore appearing for a defendant is not made until the case is called for trial, in the absence of the accused, and is made for the purpose of preventing a trial, the court may decline to recognize the withdrawal, and require counsel to continue his appearance. To hold otherwise would put it in the power of

counsel to hinder and delay the administration of justice by preventing the trial of such causes when the accused is voluntarily absent. The record before us does not show that the court so ruled, but, upon the contrary, it appears that "the court in the absence of the defendant, and without any appearance in his behalf, caused the jury to be impaneled, and the defendant to be put on his trial without any one in any manner representing him." This was clearly error, for which the judgment of the district court must be

Reversed.

STATE *v.* HALE

Supreme Court of Iowa, 1894. 91 Iowa 367, 59 N. W. 281.

The defendant appealed from a judgment of conviction of the crime of maintaining a liquor nuisance.

KINNEY, J. . . . .

IV. The jury retired to deliberate on its verdict at 10:30 o'clock A. M., December 6, 1892, and was called into the court room at 2:45 P. M. of the same day. The jury was questioned by the court with a view of ascertaining whether its disagreement related to a matter of law or fact, and, it appearing that the differences arose out of a disagreement as to both the law and facts, the court gave it a further instruction as to the law, and it again returned to the jury room. During the time that the jury was in the court room the defendant was not present, and his attorney came in during the course of investigation. It is insisted that there was such misconduct on the part of the trial court as to require us to reverse this cause. The defendant was not required to be present, though it would have been proper for him to have been notified of the proposed action of the court. It seems, however, that his whereabouts were not known. Code, section 4351. That counsel was not advised of the court's action before the jury was brought in, appears to have been his own fault. He could not be found. Counsel who are interested in a cause in which a jury is deliberating know that they may be wanted at any moment, and must either be in attendance at court, or advise the court or proper officers where they can be found. Judicial proceedings can not stop because of a failure of counsel to do their duty in this respect. Even after defendant's counsel arrived in the court room, he made no objection to the conduct of the court, or to the questions being propounded, until after the whole inquiry had been concluded. That was too late to prevent the evil, if any resulted. We do not think the defendant is in a situation to complain after permitting the questions to be asked

and answered without objection. Certainly, his counsel, after he arrived, should have taken the usual steps to prevent the further progress of the examination of the jury by the court, and not have waited until the conclusion of the entire inquiry. It does not appear that this jury made any request to be called before the court for any purpose, and it had been out but a short time. There is no doubt that when a jury makes known to the court the fact that it can not agree, and ask to be discharged, or when it asks for further instructions, or when it has been out a long time without reaching an agreement, and perhaps in other cases, the court may have it brought in, and may inquire as to the probability of its reaching an agreement, and how they are divided as to numbers, and how long they have stood numerically the same. It is proper, also, to ascertain if their disagreement is touching the law or facts, and, if the parties consent thereto, the court may have the testimony about which the disagreement arises read to the jury. Such inquiries are necessary to advise the court as to the propriety of discharging the jury. While, ordinarily, the court would not be warranted, on its own motion, in bringing in a jury when it had only been deliberating four or five hours, still no arbitrary rule as to time can be established. It will depend upon the character of the case, the number of witnesses whose testimony must be considered, and the like. The case at bar involved but few facts; the testimony was brief; the witnesses were few; and, under all the circumstances, a verdict should have been reached within a short time after the jury retired. Such matters are so largely within the discretion of the trial court, that we should not interfere, unless it clearly appears that there has been an abuse of that discretion. We can not say that the court, in view of all the circumstances, erred; and, if it did, we do not think that defendant is in a situation to complain. In any event, we are of the opinion that the defendant was not prejudiced by the action of the court. Code, section 4538. We discover no reversible error.

Affirmed.

SECTION II

COUNSEL

Two problems are presented here. If any substantial prejudice may have been suffered by the defendant either by the denial of or infringement upon his right of counsel, or by the improper conduct of counsel for the prosecution he is entitled to a new trial.

STATE *v.* McGHUEY

Supreme Court of Iowa, 1911. 153 Iowa 308, 133 N. W. 678.

The defendant, having been convicted of the crime of assault with intent to commit rape under an indictment for rape, appealed.

SHERWIN, C. J. . . . .

II. In his opening statement to the jury one of the defendant's counsel said: "It is a very serious crime, gentlemen, one which, if you gentlemen should find him guilty, the court would sentence this defendant to the penitentiary for life." An objection to such statement was made, whereupon the court said to the jury: "The jury will not consider any such statement regarding the punishment. Under our law, there are so many matters connected with it that it is improper for counsel to discuss those matters to the jury." There was no error in this direction to the jury. It was the jury's right and duty to pass upon the facts presented for its consideration, and, when that was done, its responsibility ceased. If the facts were such as to demand a conviction under the law and the obligation of the oath taken, the punishment provided by the law could make no difference with the discharge of the duty imposed. Furthermore, while the crime of rape may be punished by life imprisonment, the statute also provides that the punishment may be for any term of years, thus giving the trial court wide discretion in the matter of punishment, and counsel clearly had no right to assert that the court would inflict the greatest penalty possible under the law.

. . . . . .

VIII. The verdict was taken in the presence of the defendant, but while his counsel were absent from the courtroom; and this is assigned as error. No request seems to have been made for the presence of counsel, and there was no error in taking the verdict in their absence. Code, section 5403, requires only the presence of the defendant when the verdict in a felony case is rendered, and the presence of counsel is not required. *State* v. *Shepard,* 10 Iowa 126; *Martin* v. *State,* 79 Wis. 165 (48 N. W. 119); *Barnard* v. *State,* 88 Wis. 656 (60 N. W. 1058); *People* v. *Bennett,* 65 Cal. 267 (3 Pac. 868).

If the defendant had asked and had been refused the right to poll the jury by his counsel, a different question would be presented, a question that we do not now determine. We find no error which would justify a reversal herein, and, as we are satisfied that the verdict and judgment are fully supported by the evidence, the judgment must be, and it is, *Affirmed.*

STATE *v.* TRAUGER

Supreme Court of Iowa, 1898. 77 N. W. 336.

The defendant appealed from a judgment of conviction of burglary.

GRANGER, J. . . . .

2. The county attorney in his opening argument to the jury made use of the following language: "If a man comes to me, and says, 'Ross, your garment is a stolen garment,' I think I'll show him where I got it. I will call in Mr. Olson, and show that he made it. That accused man ought to be honest to society, and if we have made a chain, and put it around you, and fasten it, and all you have to do is to reach in your pocket and get an instrument and snap it asunder, you ought to do it." The following is section 5484 of the Code: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys shall be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial." Whether or not the language used amounts to a reference to the fact that defendant did not testify in his own behalf—inasmuch as it does not in terms do so—depends on what the jury might reasonably understand from its use. The object of the statute is to keep such fact from the minds of the jurors, and thus avoid prejudice on account of it. The first part of the statement, as to the garment, may be said not to refer to defendant; but what other application can be put on the other part? It commences, "That accused man." What accused man? That it has a different reference from the first part is clear, for there he is himself the accused man. In the latter part he says: "And if we have made a chain, and put it around you, and fasten it, and all you have to do is to reach in your pocket and get an instrument and snap it asunder, you ought to do it." Whether this was addressed to the defendant, or to some one whom the attorney, to illustrate, assumed to be accused, the understanding from the language is the same. It means, when given application to a criminal trial, that when a chain of circumstances is woven around a defendant, and he has the means present with him to break the chain, he should use such means, and the inference is that, if he does not, it is a circumstance against him. We think no juror would listen

to such a statement, in a case where a defendant had not been a witness, and fail to understand that it meant that, if the defendant could deny the facts proven against him, he would take the witness stand and do it. In the first part of the statement reference is made to evidence to be obtained from others, while in the last part reference is made to what the accused has, as, if he has nothing more to do than take an instrument from his pocket and snap the chain asunder, he should do it. The state of Missouri has a statute quite similar, providing that, in such a case, the fact of not testifying shall not "be referred to by any attorney in the case." Rev. St. 1889, §4219. In the case of *State* v. *Moxley*, 14 S. W. 969, the prosecuting attorney used the following language: "They have offered not a word to explain or show how that woman came to her death. Not a neighbor was put upon the stand, if I am right,—man, woman, or child, kinsman or stranger,—to show what he said had caused her death, gentlemen. Instead of hunting up an explanation made by him to his neighbors,—or, if they ever made an effort, they never produced the result of that effort in the court. There they are, alone,—she in perfect health; and in the nighttime she comes to her death suddenly. We say that common honesty, common decency, require, at the hands of that man, when he sees his neighbors, to tell how she came to her death. I don't care whether innocent or guilty. If guilty, he goes to work to make up a story; if innocent, he tells the truth. The neighbors expected it of him. Your neighbors would expect it of you; and, gentlemen, you would expect it of yourselves." In that case the court, after defining the words "referred to" as meaning "alluded to," said as follows: "If the object of the statute was to prevent the jury from considering the fact that a defendant has failed to testify, it is easy to see that as much could be accomplished to defeat that object by an allusion to such facts as by reference thereto. The language of which complaint is made was simply an adroit and insinuative attempt indirectly to accomplish what could not have been accomplished by a direct statement. The statute does not permit such evasions of its manifest purpose." The language in that case is not as clearly violative of the statute as is the language in this case. It may be well to also state, as this is a criminal case, that the language used does not meet the letter or spirit of the law in a criminal case. It violates the rule substantially announced in all criminal trials, that the defendant is presumed innocent until guilt is established by the state. Guilt is not to be presumed from a failure to disprove any fact. No conviction could rest under an

instruction announcing a rule like that involved in the statement of the county attorney. A new trial was asked because of the language used by the county attorney, and it was error to refuse it.

Reversed.

STATE *v.* DAVIS

Supreme Court of Iowa, 1900. 110 Iowa 746, 82 N. W. 328.

From a judgment of conviction of the crime of burglary, one of two joint defendants appealed.

GIVEN, J. There was no question but that a burglary was committed as charged. The controversy was whether the appellant and his co-defendant, Hart, were connected with its commission. Appellant's first complaint is of the conduct of counsel for the state in certain particulars in the opening statement and in the closing argument to the jury. The statements, as claimed to have been made, are set out in what purports to be a bill of exceptions, but which, according to appellant's abstract, does not appear to have been signed by the judge, nor is it anywhere alleged in the record to have been signed by him. Appellee's additional abstract shows that several affidavits were filed in resistance of appellant's motion for a new trial, showing that the statements complained of were not made as claimed, and, as made, were not objectionable nor prejudicial. With this state of the record, we cannot say that remarks were made by counsel, as claimed and complained of by the appellant; but, conceding that they were, we do not think they exceed the privilege of the occasion, or were prejudicial. For instance, it is claimed that in the opening statement counsel said: "I think we will introduce other evidence from the lips of each one of the gentlemen himself that his former record has not been—" Objection being made the sentence was not completed. The complaint is that this called the attention of the jury to the fact that defendants might testify in their own behalf. But not so. The state may have expected to prove important matters "from the lips of each" by showing admissions or confessions made by them. It is claimed that, as a completion of said statement, other counsel for the state said in the opening statement: "We expect to show that he has been convicted of felony." According to the bill of exceptions, this was objected to, and the court said: "Objection sustained. The jury will not consider that remark,"—thereby admonishing the jury not to consider these statements, and removing any possible prejudice that could result from them. Other similar complaints are made, based upon said alleged bill of exceptions,

but we fail to discover that the complaints are well founded, or that appellant was prejudiced.

. . . . . .

Affirmed.

STATE *v.* HASTY

Supreme Court of Iowa, 1903. 121 Iowa 507, 96 N. W. 1115.

The defendant appealed from a judgment of conviction of adultery.

LADD, J. . . . .

X. The defendant did not go on the stand as a witness, and he insists that one of the attorneys assisting the county attorney, in his arguments to the jury, alluded to the fact, in violation of section 5484 of the Code. According to the affidavits filed, he stated, "There has been no witness on the stand contradicting the very material evidence of Mrs. Hasty, and no witness has been on the stand as to the cow barn transaction." It is argued that as but three persons were present and Olive White was dead, but one witness, the defendant, could have contradicted her testimony of seeing them engaged in sexual intercourse, and hence that the statement must be construed to allude to his failure to testify. The trouble with this is that an argument is necessary to show the connection. In *State* v. *Baldoser,* 88 Iowa 55, the reference was direct. But the state has the right to call the jury's attention to the fact that certain evidence is uncontradicted, even though the accused may be the only person who might have contradicted it. *State* v. *Snider,* 119 Iowa 15; *State* v. *Seely,* 92 Iowa 488; *State* v. *Kidd,* 89 Iowa 54, 66. The statement to which exception is taken amounted to no more than an assertion that Mrs. Hasty's evidence was uncontradicted by any witness, and, under the authorities cited, cannot be held to be within the prohibition of the statute. See, *contra, Dawson* v. *State,* (Tex. Cr. App.) 24 S. W. Rep. 414. Whether the county attorney made similar statements is in dispute, and as to these we accept the finding of the district court. *State* v. *Maynes,* 61 Iowa 119.

Most of the criticism of the argument of another attorney assisting the county attorney at the trial is answered in *State* v. *Burns,* 119 Iowa 663. If the crime was bitterly condemned, it may be said the undisputed facts justified strong language. If other offenses were alluded to, it was in response to argument of counsel for defendant. They had taunted the state for not prosecuting him for other crimes and delaying this prosecution until twenty days

of the period of limitation. The response was that it was true that he had taken the girl into his home and seduced her, that the jury would not require five minutes to convict him of rape, and that punishment for the offense charged was all that was possible now. The rejoinder was justifiable. But the attorney went farther and declared that, "while I would not advise taking human life, Lemuel White would be justified in taking the life of defendant." This is but the expression of the attorney's opinion of what White would have the right to do in the future, not of what he ought to have done or should do. In this respect, and others, the language differs from that condemned in *State* v. *Proctor,* 86 Iowa 698. On such occasions hyperbolical expressions have been indulged in always, and probably always will be, and when mere deductions from the evidence and relating to a future course of conduct, not pertaining to the result of the trial, as in the instant case, they cannot ordinarily be regarded as prejudicial. It would be undertaking too much to vindicate all expressions of opinion made in the heat of argument, and this is not essential in order to sustain a conviction. If not calculated to unduly arouse the passions or to divert the jury from the proper discharge of their duty, the verdict should not be disturbed. We are not to be understood as approving the language employed. It was unsound in law. It was opposed to modern notions of good morals. Its tendency was to encourage avenging wrongs by means other than through the orderly administration of justice. And yet it was the mere suggestion of what a witness might be justified in doing in the future, and ought not to be held to have improperly influenced men of ordinary intelligence, as the jurors are presumed to have been, in the proper discharge of their duties in the present. They were not concerned with what the father of the girl might do hereafter, but with what the defendant had done in the past.

. . . . . .

Affirmed.

STATE *v.* HOGAN

Supreme Court of Iowa, 1902. 115 Iowa 455, 88 N. W. 1074.

Having been convicted of burglary, the defendant appealed.

McClain, J. . . . .

Complaint is made of the action of the prosecuting attorney in asking a witness for the defendant on cross-examination whether he had ever been in a reform school. The objection to the question was sustained, but appellant contends that the misconduct of the

attorney in asking the question was so far prejudicial as to require reversal. The question should not have been asked, but whether this misconduct was such as to require a new trial was a matter to be determined primarily by the trial court, in its discretion. As said in *State* v. *Ean,* 90 Iowa 534. "The court below had full opportunity for observing the effect of the attempted introduction of testimony on the jury, and, by overruling the motion for a new trial, has virtually found that it was without prejudice." Defendant asked no direction to the jury, at the time or afterwards, for the purpose of removing any prejudice that might have arisen, and cannot now complain. *Blair* v. *Madison County,* 81 Iowa 313.

Misconduct of the prosecuting attorney in another matter is complained of. One of the defendant's witnesses, having been asked on cross-examination whether he had conversed with the defendant prior to the trial with reference to the evidence he would give, denied any such conversation, and was then asked whether he had not, at a particular time and place, said to a person named that the defendant had approached him and asked him to testify in a certain way, with the insinuation that if he did not he had better look out for his personal safety and the safety of his property. The witness practically admitted having made such a statement. The question was, no doubt, a proper one for the purpose of laying the foundation for impeachment, but the fact of defendant having made any such statement was not proven. The evidence went to show an outside conversation by the witness, in which he said that such statement had been made to him. Such conversation did not in itself tend to show that the statement was made, and the prosecuting attorney should not, in argument, have referred to this assumed threat as tending to show the character of defendant. It seems that defendant's attorney during the argument for the state objected to any reference being made to the testimony relating to this conversation, as showing any threat made by defendant; but the trial judge refused to take any notice of this objection, on the ground that he could not instruct the jury orally. This view was not sound. A direction that reference to this matter as evidence against the defendant should not be made in argument would not have been an instruction which must be in writing. It is evident that such a direction would have been very much more effective given at the very time an improper argument was proposed to be made, and for the purpose of preventing it, than if postponed until the end of the trial, when the prejudice against defendant on account of this assumed threat had become fixed in the jurors'

minds by reason of the argument of the prosecuting attorney. On the submission of the case to the jury, the court, in one of its instructions, correctly charged that the evidence as to the witness' outside conversation in regard to this matter was to be considered only so far as it might affect his credibility; and, if the evidence had not been commented on by the prosecuting attorney in an improper way, this instruction would undoubtedly have been sufficient to prevent prejudice by reason of misapprehension by the jury of the purpose for which the evidence might be considered; but such an instruction was, we think, not sufficient to remove the prejudice which may reasonably be presumed to have arisen from the improper argument. See *State* v. *Helm,* 97 Iowa 378; *People* v. *Mull,* 167 N. Y. 247 (60 N. E. Rep. 629).

Appellant complains of refusal of the court to instruct that the jury should not consider for any purpose the failure of defendant and his co-defendants to testify in the case. All the defendant was entitled to in this respect, however, was an instruction that failure of defendant himself to become a witness should not have any weight against him on the trial (Code, section 5484), and this instruction was given. Those indicted jointly with him were not defendants in the case then being tried, and the jury would be at liberty to draw the same inference from the failure to call them as witnesses as would be justified from failure to call any other person who appeared to be cognizant of the facts, and was not asked to testify with reference thereto. The appellant could have called his co-defendants as his witnesses, had he seen fit. *State* v. *Nash,* 10 Iowa 81.

For the errors pointed out, a new trial is granted.

Reversed.

STATE *v.* BUSSE

Supreme Court of Iowa, 1904. 127 Iowa 318, 100 N. W. 536.

Having been convicted of murder in the first degree and sentenced to be hanged, the defendant appealed.

SHERWIN, J. . . . .

In the closing argument for the State, counsel called the jury's attention to the facts developed upon the trial of murder cases elsewhere. He related a case where a minister had brutally murdered his wife. This was apparently in answer to the argument of the appellant's counsel that because the appellant was a member of the church he could not be guilty. Again, he related the circumstance of the murder of one friend by another for the purpose of

securing a pair of shoes, and commented upon the depravity of the murderer. We see nothing in the argument relating to these two cases calling for censure even. The comments thereon were legitimate, in the first case in answer to the argument of opposing counsel, and in the second case for the purpose of illustrating the slight motives which sometimes induce murder.

The third statement complained of presents a question of a much more serious nature. Counsel told of a case in the State of Illinois where one juror of the panel which acquitted the defendant afterwards took part in lynching him. True, counsel did not say in so many words that the accused was lynched after acquittal, but the veil covering the allusion thereto was so transparent that it hid nothing. In justice to counsel, however, we should further say that his comments on the verdict related only to the failure of the jurors to do their duty, regardless of everything else. We do not think counsel intended to impress upon the jurors the possibility of a lynching in case they should acquit, but enough was said to suggest to them that an acquittal might create such a feeling of condemnation in the public mind as to produce a like result. What its influence upon the jury might have been we cannot say, but it needs no argument or citation of authority to show that jurors should not consider such matters, or that the prosecution should never, directly or indirectly, suggest the thought to them; and this is especially true in cases calculated to arouse public excitement and indignation. While we would not consider it necessary to reverse this case on account thereof, we see no justification or excuse for the statement, and cannot refrain from this criticism of it.

In the absence of the confession, the State must have relied upon circumstantial evidence to secure a conviction. When Schneider heard the screams, and, looking, saw the defendant and his wife standing together in the yard, he saw no violence offered the wife by the defendant, and until the confession was made there was no direct evidence of what occurred in the house when Mrs. Busse was killed. In his confession the defendant stated that she struck or struck at him as he entered the door of the house, and that he then "went wild," and struck her with a chair. If the jury found this exculpatory statement true, there would have been ground for finding the defendant guilty of a lesser crime than murder in the first degree. The defendant asked the court to instruct specifically on this branch of the case, applying the law to the facts before the jury; but the instruction was not given, nor was any given specifically calling the jury's attention to the transaction as related by

the defendant. The court gave only the naked legal definitions of the two degrees of murder and of manslaughter. The instructions given announced correct rules of law without doubt, but something more than this is often necessary to insure a perfect understanding of the legal effect of proven facts. If the defendant, in the heat of passion, provoked by his wife's act, and without deliberation or premeditation, struck her a blow which was fatal, he was wrongly convicted of murder in the first degree. The evidence tended very strongly to prove that death was caused by the blow or blows on the head; and, while the jury may not have found the exculpatory part of the confession true, the confession, considered as a whole, the nature of the case, and its importance as well to the State as to the defendant, demanded that the court apply the law to the exculpatory part of the confession, instead of leaving the application thereof to the jury without further light than was given in the naked legal propositions. There was evidence, it is true, tending to prove all of the elements of murder in the first degree; but it was not so overwhelming as to preclude any other finding. The facts presented to the jury were peculiarly revolting. The brutal mutilation of the body, and the other conditions present when it was found, were well calculated to arouse the passion and prejudice of any man with human instincts; and still these conditions were not absolutely inconsistent with the theory of the defense that Mrs. Busse was killed by a blow on the head, delivered in the heat of passion, and under the circumstances stated in the defendant's confession. It was the defendant's right to have this defense plainly defined in the instructions to the jury, and this we are constrained to hold was not done. The court, in its charge, gave the usual definition of manslaughter, and in another instruction said:

If you do not find the defendant guilty of murder in either the first or second degree, but do find from the evidence introduced upon the trial, under these instructions, beyond a reasonable doubt, that the defendant, in Butler county, Iowa, on or about June 18, 1901, did unlawfully kill Lena Busse, without malice either express or implied, and without deliberation, by resorting to any or all of the methods alleged in the indictment, then you ought to find the defendant guilty of manslaughter, whether such killing was voluntary or involuntary. Otherwise you should not so find.

In Bishop's New Criminal Procedure, section 878, the learned author says:

The law of the case which the judge is to lay down to the jury is not the abstract law, such as a statute or common-law definition of

a crime, but the law's conclusion from the several, and perhaps varied facts which the evidence tends to establish, viewed in connection with the pleadings. Therefore no abstract proposition, however correct, should be given in charge; not only because it would be confusing to the jury, who, being unused to legal disquisitions, would not know how to apply it, but also because its combination with the special facts might render it erroneous.

. . . . . .

Affirmed.

SECTION III
THE JUDGE

The judge presides at the trial and it is his duty to be present. His absence from the court room during a criminal trial will be sufficient in itself to authorize a reversal of a judgment of conviction unless it is affirmatively shown that no prejudice resulted to the defendant.[1] Under certain circumstances one judge may be substituted for another. Thus in *State* v. *Jones*[2] it was held not to be improper for a judge who had heard the evidence, received the verdict and denied a new trial, to write out the sentence he thought proper and have it imposed by another judge. In *State* v. *McCray*[3] it was held that there was no error in the substitution of one judge for another while the evidence was being introduced, the attorneys for both sides consenting.

"It must be remembered that jurors watch courts closely, and place great reliance on what a trial judge says and does. They are quick to perceive the leaning of the court. They are prompt to notice the inclination, even, of the court, and from his conduct, whether properly or not, they will almost invariably arrive at a conclusion as to what the court thinks about the case. Every remark dropped by the court, every act done by him during the progress of the trial, is the subject of comment and conclusion by jurymen. Hence it is that judges presiding at trials should be exceedingly discreet in what they say and do in the presence of a jury, lest they seem to lean towards or lend their influence to one side or the other."[4] If, by the absence of the judge during the trial or any improper conduct on his part, there may have resulted prejudice to the defendant, he is entitled to a new trial.

[1] *State v. Carnagy* (1898), 116 Iowa 483, 76 N. W. 805.
[2] (1901), 115 Iowa 113, 88 N. W. 196.
[3] (1920), — Iowa —, 179 N. W. 627.
[4] *State* v. *Allen* (1896), 100 Iowa 7, 67 N. W. 274.

STATE *v.* BURNS

Supreme Court of Iowa, 1903. 119 Iowa 663, 94 N. W. 238.

From a judgment of conviction of the crime of seduction, the defendant appealed.

WEAVER, J. . . . .

II. Complaint is made that during the argument of counsel the judge presiding was absent from the court room, dictating instructions to the reporter, and while so employed could not hear what was being said and done in the presence of the jury. The point made does not appear to be sustained by the record. It is shown by the bill of exceptions that the judge left his desk, and went to a door leading into an adjoining room, where the reporter was employed, and, standing in or at the door, dictated to the reporter, in a low tone, the charge to the jury. He was in a position at all times to have an oversight of the courtroom, and to rule promptly upon any question of order or procedure which might arise in the progress of the argument. Appellant does not seriously question this statement, but insists that the act was prejudicial, because the judge was "absent to that extent that he could not have heard and comprehended what was being said by counsel, because he was so engaged that it was impossible." It is also further said that the court should not dictate its instructions in the presence of the jury, and thus distract the jury's attention from the argument of counsel. As to the first point, we think there is no law or rule of practice which makes it reversible error for the court to fail to hear and comprehend the argument of counsel. The most attentive and observant court is not always able to accomplish that desirable end, even when the argument is directed to itself; and certainly it should be regarded no lapse from judicial propriety, if, during an argument to the jury, the judge, while remaining in direct supervision of the court room, turns his attention to the preparation of his charge. We can understand, of course, that a judge dictating instructions as indicated in the present instance, could do so in such loud voice and obtrusive manner as to seriously interfere with the argument and afford just ground of exception, but no such gross breach of decorum has been here shown.

. . . . . .

Affirmed.

STATE *v.* PEIRCE

Supreme Court of Iowa, 1916. 178 Iowa 417, 159 N. W. 1050.

The defendant appealed from a judgment of conviction of conspiracy.

SALINGER, J. . . . .

V. It is urged that there was reversible misconduct of the court in its entire attitude during the trial; in remarks by it to the bailiff; in the manner of rulings; in remarks to witnesses and as to counsel.

The part of the complaint which deals with telling the bailiff concerning what to do with the jurors to keep them free from interference, and which it is claimed tended to frighten them, seems to us to be hypercritical and strained. And so of threats to clear the room, which it is claimed were not justified by the conduct of those in the court room. At all events, neither, in reason, could prejudice defendant.

5a. The court, in admonishing the jury at the beginning of the trial, said:

"The rule in criminal cases is to prevent the jury from separating after they were sworn to try the case. This rule is statutory."

As to this, it is now claimed: (1) that it is an incorrect statement, because jurors may be permitted to separate during the trial up to final submission, except where one of the parties objects; (2) that it was possibly calculated to unduly alarm the jury, especially when made in connection with the strict admonitions given the triers at the commencement of the trial. If what was said is not, in strictness, correct law, the error was harmless, and we cannot see what there was in it to alarm the jury.

5b. The remarks of the court while defendant's witness Miller was being cross-examined are hardly justifiable, but we do not think a reversal is required on their account.

5c. When the State excused the witness Wianand, its attorney remarked that the State had a right to put in its case as it pleased. "We are not through with this witness. This is all we want with him now." The witness was not recalled when the State closed, and counsel for defendant professed to be surprised, and stated that the attorneys for the State had said they would recall the witness; whereupon counsel for the State said, "We didn't tell you any such thing." Counsel for the defense responded that the State had announced that they would want to recall the witness. Upon this, the court reproved counsel, saying the statement was improper, and that he asked counsel to refrain from making it; that the statement made by the State was that they would introduce their evidence in their own way; and that the court had told them they could do that. It is true it had not been said in so many words that the witness would be recalled, but more had been said

than to claim the right to introduce evidence as the State pleased. It was also said that the State was through with the witness, and would not "want him now." The inference from this that the witness would be recalled was so very natural that counsel for the State should not have said, in effect, that the opposing one falsified in claiming that understanding. The reprimand given was unwarranted. If any was due, it should have been to counsel for the State. We do not think, however, this requires reversal.

5d. Officer Keane was a witness friendly to the State. On his direct examination, he was asked what was the fact as to his having seen De Roos at night and day frequently with Peirce in Peirce's private office. In objecting to this as leading and suggestive, counsel for the defense added that there ought to be some witnesses to whom an objection of that kind might be good, whereupon the court remarked:

"They would all be if Mr. Hatfield (one of the attorneys for defendant) had left them alone, and not got the statement."

Objection was made, and the court was asked to withdraw the remark. Whereupon it said that leading questions had been permitted because the witnesses seemed evasive, and that:

"The remarks of the court in reference to that, indicating that there had been any tampering with the witnesses, may be stricken from the record. The court did not intend to convey any such meaning."

We assume, therefore, and, for that matter, find the fact to be, that there was no foundation in the evidence for the quite suggestive intimation that Mr. Hatfield had so failed to leave the witnesses alone as that the court was required to permit their being led. Unjustified attacks by counsel upon parties have resulted in the annulment of verdicts. See cases cited in another division of this opinion. So have attacks upon those acting for a party (*School Town* v. *Shaw,* 100 Ind. 268), and attack of witnesses (*Rudiger* v. *Chicago, St. P., M. & O. R. Co.,* (Wis.) 77 N. W. 169; *German-Am. Ins. Co.* v. *Harper,* (Ark.) 67 S. W. 755). We hold, in *Welch* v. *Ins. Co.,* 117 Iowa 394, at 405 to 407, that running comments calculated to cast odium upon a witness will warrant a reversal, even though constant objection be not made; and where they are sufficiently gross, it is not material that they are provoked by objecting counsel.

Imputations by counsel that witness had been unduly influenced, tampered with or suborned, have caused reversals, or, for some special reason, have been disapproved without reversal. *Whitsett*

v. *Chicago, R. I. & P. R. Co.*, 67 Iowa 150, at 159; *Rudolph* v. *Landwerlen*, 92 Ind. 34; *Rudiger* v. *Chicago, St. P., M. & O. R. Co.* (Wis.), 77 N. W. 169; *State* v. *Helm*, 92 Iowa, at 545. If this is true of remarks by counsel, how much more injurious must such be when made by the trial judge.

In *State* v. *Helm, supra*, we say, as to what counsel said as to those who had given testimony favorable to his adversary, that:

"Any unauthorized statement which would make them appear to the jury to be less credible than they were in fact, would have been prejudicial to him. That the words in question were calculated to cast odium upon the witnesses to which they referred and cause their testimony to have less weight with the jury than it would have had if the words had not been spoken, is, we think, evident."

Is it not as injurious to have the court say it of an attorney for one party?

State v. *Stowell*, 60 Iowa 535, at 538, applies in principle, though an unjustified support of, and not attack upon, a witness is involved. In it, we hold that it was for the trial court to say whether corroboration was required. But because, in doing so, it was remarked that, "because of the tender age of the prosecutrix, . . . she was incapable of designing or fabricating evidence," we said:

"The effect, we think, necessarily was prejudicial to the defendant. We are not prepared to admit that the court, under the guise of determining some questions which are legitimately before it, can make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, but because they are not, it must be held the defendant is not prejudiced."

In *Shakman* v. *Potter*, 98 Iowa 61, 65, 66, during a difficulty between counsel over whether the one for plaintiff had correctly read an answer in a deposition, the court remarked, in the presence of the jury:

"Upon listening to the reading of the deposition, I have no doubt but what Mr. Bloodgood, plaintiff's attorney, was present at the taking of the deposition, or that the answers had been written out by him, or plaintiff's attorney."

We say:

"Manifestly, such a remark was not only erroneous, but highly prejudicial, ... and the remark made by the court could have no other effect than to demolish and destroy the whole of the witness's testimony. If such a statement had been embodied in the written charge of the court, it would clearly be erroneous; and

while it was not contained in the formal instructions, yet its effect, following so closely the reading of the deposition, was just as prejudicial to plaintiff's case as if it had been."

State v. *Philpot*, 97 Iowa 365, cited by appellant, presents so extreme a prejudicial remark on part of the trial judge as that the decision cannot rule here, and we cannot see much bearing in the case of *In re Will of Knox*, 123 Iowa 24. But without these, we are satisfied that the remark concerning Hatfield was injurious to defendant's cause, and, as will appear elsewhere herein, the injury was neither cured nor waived.

. . . . . .

Reversed.

SECTION IV
THE JURORS

The jurors, being the judges of the truth of all questions of fact upon which the guilt or innocence of the defendant may depend, must be present at all stages of the trial when such evidence is being introduced or being discussed in the argument of counsel, and when the judge is instructing them in reference to the application of the law to those facts. But during the argument by counsel to the court of problems preliminary to the introduction of evidence, such for example as its admissibility, it is not essential that the jurors should be present and is sometimes advisable that they should not be.

Improper conduct of any juror, prejudicial to the defendant, will entitle him to a new trial.

STATE *v.* OLDS

Supreme Court of Iowa, 1898. 106 Iowa, 110, 76 N. W. 644.

The defendant, having been convicted of forgery, appealed.

ROBINSON, J. . . . .

VI. The appellant complains of misconduct on the part of some of the jurors. It appears that for a considerable time preceding the agreement eleven of the jurors favored a verdict of guilty, and that Juror Higgs alone favored a verdict of not guilty. Affidavits of several of the jurors have been filed, which state, in substance, that while the jury was considering the case, and while Higgs was contending for a verdict for the defendant, some of the jurors told him, in order to induce him to agree to a verdict of guilty, that, counting jurors who had favored conviction on the former trials,

twenty-five or thirty jurors believed the defendant guilty; that defendant had been caught with a woman or women in a block in the town of Perry, suggesting that he had been guilty of immoral sexual relations with the woman or women; that he had been in several "scrapes" in Perry before, although the nature of the "scrapes" was not stated, excepting that they were dishonorable; that the defendant had been in at least two other "scrapes" of the same nature as that involved in this case; that he was generally crooked; that he was a bad man generally, and ought to be convicted, and that the general outside opinion was that he was guilty. Some of the affidavits state that while the jury was deliberating some of the jurors had a conversation in the hall adjoining the jury room, with the sheriff, who was acting as bailiff in charge of the jury; that the sheriff was then told that there was "no way of bringing Higgs over unless we freeze him out," and the sheriff answered, "You will have to freeze him out, then, as the judge says there will have to be a verdict;" that the statement of the sheriff was repeated to Higgs; that Higgs was asked by the jurors how much he was getting for hanging the jury, and he was accused of having improper motives in doing so, and it was suggested that he had received money for that purpose; that it was repeatedly said in the presence of Higgs that the other jurors would freeze him out; that they could stand it longer than he could. Other statements of an improper nature are alleged to have been made during the deliberations of the jury. An affidavit made by Higgs states that from what the judge said about having a verdict he became strongly impressed with the idea that a verdict would have to be rendered; that he did not believe that the evidence showed that the defendant was guilty; that the other jurors insisted on a verdict for the state; that the sheriff had informed him that the defendant would get a re-hearing in the supreme court, and would not have to go to jail; that the affiant believed he could not hold out much longer against younger and more robust men, and, not caring to endure longer the insinuations and covert abuse to which he had been subjected for hours, he finally agreed to the verdict which was rendered. The larger part of the affidavit of Higgs is devoted to matters which inhere in the verdict, and is therefore, of no force. However, the competent allegations of misconduct contained in affidavits filed by the defendant would have been ample, had they not been controverted, to require a new trial. *State* v. *La Grange*, 99 Iowa, 10. But the counter affidavits filed by the state show that many of the claims made by the defendant are without sufficient

grounds, and that prejudice could not have resulted to him from the matter of which he complains. It is shown that the insinuations respecting the motives and conduct of Higgs were spoken in jest, and were so understood by him; that before the agreement was reached it was stated by different jurors, and agreed to by all, that all remarks which had been made, and which were not based upon the evidence, should be disregarded, and the case determined solely upon its merits, and that thereafter no remarks were made not based upon the evidence offered in court; that it was said the case would probably be appealed to the supreme court, but it was agreed that the determination of the case by the jury could not be affected by that fact, and that it was agreed by all, especially by Higgs, that no weight could be given to the result of any former trial, and that Higgs was treated kindly and with respect, by his fellow jurors. The sheriff, in an affidavit made by him, denies explicitly having made the statements attributed to him, and recites what was said and done by him; and, if his statement be correct, he was not guilty of any misconduct. It is no doubt true that improper statements were made by some jurors while they were deliberating upon their verdict, but that alone is not sufficient to authorize a new trial. It must appear that prejudice resulted from the statements, or that they were of a character to cause prejudice, and that the presumption that they were prejudiced has not been overcome. In *Foedisch* v. *Railway Co.*, 100 Iowa, 728, it was said: "A verdict will not be set aside merely because a jury member has, in violation of his sworn duty, talked to persons about the case. It must appear that the misconduct was such as to materially affect the substantial rights of the complaining party." In *Carbon* v. *City of Ottumwa*, 95 Iowa, 524, it was said: "It is not, however, every act of misconduct of a juror which will warrant a court in setting aside a verdict. It should be made to appear that the misconduct prejudiced the complaining party. The circumstances disclosed should be such as to satisfy the trial court that a fair and impartial trial has not been had." The cases cited were civil, but the rules stated are applicable in criminal cases, although it is true that on some grounds the courts will set aside verdicts more readily in criminal than in civil cases. *State* v. *Wise*, 83 Iowa, 596. Among the cases which tend to support the rule we have announced in this case are *State* v. *Woodson*, 41 Iowa, 425; *State* v. *Beste*, 91 Iowa, 565. A careful examination of the case satisfies us that the misconduct of the jurors to which we have referred, so far as it is shown, was not prejudicial. What we have said disposes of the

controlling questions in the case. We have considered all questions presented in argument, but some are not of sufficient importance to justify special mention of them. It is sufficient to say that we do not find any ground for disturbing the judgment of the district court, and it is *Affirmed.*

STATE *v.* WEGENER

Supreme Court of Iowa, 1917. 180 Iowa 102, 162 N. W. 1040.

The defendant appealed from a judgment of conviction of robbery.

GAYNOR, C. J. . . . .

It appears that, after the jury had retired to consider their verdict, one of the jurors was in great doubt as to whether or not the defendant ought not to be discharged, on the ground of insanity. The affidavit upon which the misconduct is predicated is made by one Oransky, a juror in the cause. One Foster was also a juror. The affidavit sets out the facts, is corroborated by the testimony of other jurors, and is as follows:

"That when the jury retired for deliberation, I was in some doubt as to the question of guilt or innocence, and on the first ballot, with two others, I voted not guilty. That I felt that there had been nothing shown to us which indicated that the defendant had ever been anything else than a law-abiding citizen, and I could not understand how such a man in his right mind could suddenly attempt some crime of this kind. Some time before a verdict was agreed upon and before the final ballot was taken (I am unable to say positively whether before or after the second ballot, but my best recollection is that it was before the second ballot), the juror Foster stated in substance that Wegener had stolen eighty cars of coal from the Rock Island Railroad and had bribed switchmen to switch the cars in on his private spur; that it had not been discovered until after Wegener went away, and that it had been settled out of court by the Ills. I asked Foster if he positively knew that to be a fact, and he said that there was no question about it; that he had his information from someone who knew, and I understood it was from someone who had taken part in the settlement of the coal matter. I knew then that the juror Foster was a railroad man. These statements were made very emphatically, and I was satisfied that Foster knew what he was talking about and I believed the statement to be true. I believe that one or more of the other jurors discussed this matter at that time; but I am unable to recall the exact statements made by them and who made them. There was

also some discussion about the fact that Wegener's saloon was not operated in his own name, and I said that looked peculiar to me; that he evidently owned it, because it was turned over to his wife after he went away. My best recollection is that some juror said in substance that the reason he did not operate it in his own name was that he had been mixed up with a gambling house, and that the council at Valley Junction would not issue him a license. The jury was segregated for ten days on this trial, and during the confinement of the jury, between sessions of court and before the case was finally submitted to the jury, there was some discussion between jurors of the case, and some of the points brought out by the testimony. I cannot say how many times I heard such discussion, but I recall that I cautioned the jurors on at least one occasion that it ought not to be discussed. Enough was said at various times before the case was submitted so that, when the jury retired after final submission, I thought I knew about how most of the jurors would vote. The result of the first ballot showed that my judgment was practically correct. Three ballots were taken, and I did not vote guilty until the third ballot. I was thoroughly tired from the long confinement and strain of the trial, and I am unable to say how much influence the statements about the stealing of coal had on my mind; but the fact is that these statements were made at the time that I was attempting to determine the sanity or insanity of the defendant, and arguing that I could not understand how a man who, so far as I knew, had always been a respectable business man could get mixed in this sort of a crime unless he were crazy."

The statements made by the juror Foster, as exposed in this affidavit, were clearly prejudicial to the defendant's right to have his guilt determined upon the record made. The State had accused him of this crime, which not only involved moral turpitude but exposed him to a long term of servitude in the penitentiary. It had been presented to the court upon the trial—the evidence upon which the State predicated its right to have this man's liberty taken from him. All that was proper for the jury to consider, in the determination of the ultimate fact, was exposed to their view upon the trial. Upon that record he was to be judged. Upon that record he was to be condemned, if condemned at all. After the evidence had all been closed, after the jury had retired, by this means there was injected into that case, without notice to the defendant, evidence which would not have been admitted if offered upon the trial. Through this means, there was brought to the jury a knowledge of a fact asserted by a member of their own panel as

true, the truth of which the record shows these jurors had no reason to doubt. If true, it had a tendency to explain much of the conduct of the defendant which might otherwise seem inexplicable. At least, it seemed so to this juror, Oransky.

Conduct such as we have here is to be clearly differentiated, in its influence upon the mind and its effect upon the jurors, from mere argument of jurors, or mere statements of inferences drawn from admitted or proven facts, or reasons, however untenable, given by a jury in favor of conviction. This, for the reason that all these inhere in the verdict. Faulty and illogical argument made in the jury room by the jurors may not be considered by this court, but never has it been permitted that a juror assert, as upon his own knowledge, the existence of facts not introduced in evidence, touching the guilt or innocence of the accused. Nor has it ever been permitted that a juror, when deliberating upon his verdict, may introduce to the jury, for its consideration during its deliberations, facts *de hors* the record, reflecting upon the life and character of the accused. That these statements would exercise some influence upon the jurors, we think manifest from the character of the statements, and from the manner in which they were delivered to the jury by Foster, and from the peculiar nature of this case considered in its entirety. Here, the evidence was in sharp conflict, in so far as the criminality of the defendant on the indictment was concerned, and as to the affirmative defensive matter upon which he rested his right to an acquittal. We cannot say what the verdict would have been had this evidence not been presented to the jury at the time and under the circumstances. We have had occasion to review this question in the case of *Douglass* v. *Agne,* 125 Iowa 67, and the record here presents a stronger reason than in the *Douglass* case. See, also, *Cresswell* v. *Wainwright,* 154 Iowa 167, this point discussed on page 186; *State* v. *Kirk,* 168 Iowa 244, particular point discussed in fourth division of the opinion, page 256.

It is true that in civil cases it has been held that if, upon the whole record, it appears that substantial justice has been done, and the verdict is clearly warranted by the evidence, the court will not interfere because of misconduct of a juror committed during deliberation. This rule cannot obtain in criminal cases, for the reason that the defendant is entitled to have the judgment of twelve men upon the whole record, as made, based upon a finding and pronouncement that, under the record, his guilt is established beyond a reasonable doubt. In determining this, the judgment of the jury must rest upon the record made upon the trial. See also, *Kruidenier*

Bros. v. *Shields,* 70 Iowa 428. We are clear that the conduct of the juror Foster was prejudicial to the defendant's rights, and for this reason, if for no other, the case must be reversed.

. . . . . .

Reversed.

Evans, Weaver and Preston, J. J., dissented.

SECTION V

THE CUSTODIAN OF THE JURY

STATE *v.* PEIRCE

Supreme Court of Iowa, 1916. 178 Iowa 417, 159 N. W. 1050.

The defendant appealed from a judgment of conviction of conspiracy.

SALINGER, J. . . . .

III. Though the State suggests that the evidence is weak on whether the bailiff in charge told the jurors that the trial judge had gone to his home for over Sunday and that a resident judge had no power except to receive a verdict, we find this established and undisputed. The communication violated the statute. Code Section 5387 provides that the bailiff shall not speak to or communicate with the jury, except to ask whether they have agreed on their verdict. *State* v. *Crafton,* 89 Iowa 109, holds that this provision is mandatory.

In *Code* v. *Swan,* 4 G. Greene 32, at 33, it was shown that the bailiff "informed the jury that they would be kept by the court from Saturday evening until Monday morning without anything to eat, unless they would agree upon their verdict; and that, in consequence of this, one of the jury consented that a verdict might be returned."

We reverse because a new trial was not granted on account of this, and say:

"Any conversation by the officer ought to subject him to severe punishment by the court; and any verdict returned after such conversation, whether it had any influence or not in producing the verdict, ought to be set aside the moment the fact comes to the knowledge of the court. Although a juror might swear that in making up his verdict he was uninfluenced by the remarks made by the officer, yet he may be mistaken. It is the right of the party to have a verdict which is the result of an uninterrupted and unprejudiced deliberation."

Less than this set aside the verdict in *Farrer* v. *State*, 2 Ohio State 54, at 55. In *State* v. *LaGrange*, 99 Iowa 10, at 12, less is held to be misconduct of both jury and custodian, and to require reversal unless it is made to appear that no prejudice resulted. In *Miller* v. *Root*, 77 Iowa 545, at 549, it is said concerning a communication which is not stated, that nothing indicated that it was prejudicial. In *State* v. *Cowan*, 74 Iowa 53, at 56, the alleged statements were that the bailiff told one juror that the judge of the court said that, if the jury had once returned into court and been sent back to the jury room, "that it was a shame (or words to that effect) that one man should hang out against the eleven;" and further, that the bailiff had heard in the court room that they were going to bring in all the papers and the evidence to the jury room again; and that this induced the juror to agree, because he thought the judge ought to know better than he. That there was conflict on whether this occurred at all, alone suffices to account for our sustaining the trial court in denying a new trial. *State* v. *Beste*, 91 Iowa 565, at 568, 569, clearly does not rule here, and *State* v. *Crafton*, 89 Iowa 109, has no bearing on misconduct of bailiff. We hold that the motion for new trial should have been sustained for the misconduct of the bailiff.

Reversed.

SECTION VI

BYSTANDERS

As trials are public, bystanders have a right to attend, but the defendant's right to a free and impartial trial imposes upon all who are present the duty so to conduct themselves that this right will not be impaired. For instance, in a North Carolina case, a defendant who was convicted of murder was awarded a new trial because of the fact that during the closing argument for the defense about one hundred persons left the court room and a fire alarm was sounded, for the purpose, as found by the trial judge, of breaking the force of the argument of counsel.[1] Concerted action, however, is not necessary for the accomplishment of this result, as may be seen from a Georgia case in which it was held that there had been an undue interference with the defendant's right to a fair and impartial trial. During the trial, which was for bigamy, as the defendant was beginning to make his statement to the jury, "his first wife picked up her chair, and came around immediately in

[1] *State v. Wilcox* (1902), 131 N. C. 707, 42 S. E. 536.

front of the defendant, within three feet of him, between him and the jury, with her face turned directly on the defendant and her back to the jury, and stayed in that position for two minutes." Later, while he was yet addressing the jury, she "laughed out hysterically, and in a manner jeering, deriding and ridiculing the defendant". Then, just as he was closing his statement, his second wife's father made a contradictory exclamation in an angry, boisterous tone.[2]

SECTION VII

THE ORDER OF THE TRIAL

"The jury having been impaneled and sworn, the trial must proceed in the following order: The clerk or county attorney must read the indictment and state the defendant's plea to the jury, and the county attorney may briefly state the evidence by which he expects to sustain the indictment; the attorney for the defendant may then briefly state his defense, and the evidence by which he expects to sustain it; the state may then offer the evidence in support of the indictment; the defendant or his counsel may then offer his evidence in support of the defense; the parties may then, respectively, offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the county attorney must commence, the defendant follow by one or two counsel, at his option, unless the court permit him to be heard by a larger number, and the county attorney conclude, confining himself to a response to the arguments of the defendant's counsel. Where two or more defendants are on trial for the same offense, they may be heard by one counsel each; and when the affirmative of the issue is with the defendant, the court may, in its discretion, award to the defendant the last argument. The court shall not restrict counsel as to time in their arguments to the jury. Upon the conclusion of the arguments, the court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case" (§5372, C. C. 9434).

When the defendant's only plea is a former conviction or acquittal, this order is reversed and the defendant offers his evidence in support of his defense first (§5374, C. C. 9437). The same is true of the trial of the issue of insanity of the defendant (§5541, C. C. 9478) if such issue is raised, the trial proper being suspended until this problem is settled (§§5540–5544, C. C. 9477–9481).

[2] *Robinson* v. *State* (1909), 6 Ga. App. 696, 65 S. E. 792.

CHAPTER XII

EVIDENCE

SECTION I

THE ISSUE

"The general issue in a criminal case is formed by the accusation and the plea of not guilty. The plea of not guilty puts in issue not only every fact alleged in the accusation which it is necessary to prove in order to secure a conviction, but it puts in issue every fact which will constitute a defense and prevent a conviction. Every such fact may therefore be shown. The facts in issue are determined in each case by the charge in the indictment and by reference to the substantive criminal law.

"On indictment for murder and a plea of not guilty, the following facts, among others, are or may be in issue. The fact that the deceased is dead; that defendant killed the deceased; the fact that he did so with malice aforethought; the fact that he was at the time so mentally insane, was acting under such an insane delusion, or, in some states, under such an insane irresistible impulse, or was of such tender years, as to be legally irresponsible; the fact that he did the killing by excusable accident, or in excusable self-defense, or under circumstances justifying him; and the facts that he had received, and that he acted under, such provocation from the deceased as reduced the homicide to manslaughter."[1]

But the evidence is not limited to the facts in issue. A fact, though not in issue itself may logically tend to establish in some degree the existence or non-existence of some other fact which is in issue. Where this is true the first fact is relevant to a fact in issue. Evidence of a fact which is not in issue and is not relevant to any fact in issue is not admissible—it is "irrelevant". But evidence of any fact which is relevant to some fact in issue is admissible unless there is some arbitrary rule of law which excludes it—renders it "incompetent", or unless the fact sought to be estab-

[1] Clark's Criminal Procedure, 2nd Ed. (Mikell) pages 590-591.

lished by evidence is not sufficiently connected with the issues of the case to be material. A fact which, although relevant to some fact in issue and not barred by any arbitrary rule of law, is so remote from the issues involved that its existence or non-existence will have no bearing on the result of the case is "immaterial" and evidence thereof is not admissible.

Since "the rules of evidence prescribed in civil procedure shall apply to criminal proceedings as far as applicable and not inconsistent with the provisions" of criminal procedure (§5483), it will be neither necessary nor desirable to give extensive consideration here to the rules of evidence in general. Our attention, therefore, will be focused for the most part upon those rules of evidence which are peculiar to criminal procedure.

SECTION II

BURDEN OF PROOF

STATE *v.* LINHOFF

Supreme Court of Iowa, 1903. 121 Iowa 632, 97 N. W. 77.

From a judgment of conviction of the crime of manslaughter the defendant appealed.

DEEMER, J. . . . .

II. The trial court gave the usual instruction with reference to the presumption of innocence, and added: "These rules with reference to the presumption of innocence and the burden of proof are among the fundamental principles of our law, and must be regarded throughout your consideration of the evidence." Defendant asked instructions to the effect that this presumption stood as so much evidence. Indeed, his counsel seems to have copied a part of the opinion of the Supreme Court of the United States in *Coffin* v. *U. S.*, 156 U. S. 432 (15 Sup. Ct. Rep. 394, 39 L. Ed. 481), in one of their requests. There has been much speculation regarding the logical correctness of the argument used by the court in that case, and we have recently had occasion to say something regarding the use of the word "presumption". See *State* v. *Thiele,* 119 Iowa 659. An essay on the proper construction of the word would be profitless at this time, for, as we view it, the trial court did not err in denying the defendant's requests. Whatever the true rule regarding the use and value of a presumption, there is always danger of obscuring it by over-refinement. When a jury is instructed, as in this case, that a defendant is presumed to be innocent unless and until he is proven guilty beyond a reasonable doubt, and that it is for the

state to prove every fact essential to defendant's conviction beyond a reasonable doubt, and that these rules are to be regarded throughout their conisideration of the case, it has a more certain guide than where a trial court attempts by definition and elucidation to explain the genesis, growth, and legal aspect of the doctrine. There was no error in the instruction given. This is conceded, and we do not think there was any error in refusing to give the ones asked. It is enough to say that we do not approve of the doctrine that legal presumptions such as the one in question are to be treated as evidence. Indeed, the Supreme Court of the United States has repudiated that rule. *Agnew* v. *U. S.*, 165 U. S. 36 (17 Sup. Ct. Rep. 235, 41 L. Ed. 624). See, also, *People* v. *Ostrander*, 110 Mich. 60 (67 N. W. Rep. 1079).

On other grounds the judgment was

Reversed.

STATE *v.* SLOAN

Supreme Court of Iowa, 1880. 55 Iowa 217, 7 N. W. 516.

The defendant appealed from a judgment of conviction of the crime of bigamy.

ADAMS, CH. J. . . . .

III. The defendant assigns error upon an instruction which was given in these words: "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury." In the instruction preceding this the jury were told that if they were satisfied of the defendant's guilt, beyond all reasonable doubt, they should convict, and otherwise acquit. Taking the two instructions together, they might be considered as meaning that the jury should acquit if a reasonable doubt arose in the mind of one juror. With this view the defendant ought not to complain. But the jury was, we think, liable to be misled, and conclude that unless the doubt arose in the minds of all the jurors it was something less than a reasonable doubt, and should be disregarded. *State* v. *Stewart*, 52 Iowa 284. The true idea, we think, is that each juror, under his oath, must vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind. We do not mean that each juror may not consider and respect the views of his fellow-jurors. But when he has accorded to them all proper consideration and respect, if a reasonable doubt arises in his mind, or fails to rise, he should vote accordingly.

For the error pointed out the case must be remanded for another trial.

Reversed.

STATE *v.* DONOVAN

Supreme Court of Iowa, 1883. 61 Iowa 278, 16 N. W. 130.

The defendant appealed from a judgment of conviction of the crime of adultery.

DAY, CH. J. . . . .

III. The appellant complains of the following instruction: "The burden is on the state to show that the indictment was found on the complaint of the wife, and failing to do so the jury should acquit." The objection made to this instruction is that it does not direct that the fact referred to must be proved beyond a reasonable doubt. In *State* v. *Henke*, 58 Iowa, 457, it was held that an averment in an indictment that the prosecution was commenced on complaint of the wife, must be proved by the state. Such fact is essential to the conviction of the defendant, but it does not enter into or constitute any part of the facts which go to make up the crime. Whilst, therefore, the defendant cannot be convicted without proof that the indictment was found on complaint of the wife, we do not think it is incumbent upon the state to establish the fact beyond reasonable doubt. The thirteenth instruction asked by the defendant was correctly refused, if for no other reason, because it required the fact of the wife's complaint to be established beyond a reasonable doubt.

. . . . . .

Affirmed.

STATE *v.* SMITH

Supreme Court of Iowa, 1920. — Iowa —, 180 N. W. 4.

The defendant appealed from a judgment of conviction of the crime of rape.

SALINGER, J. . . . .

In instruction 9 it was correctly charged that there could be no conviction without corroboration, correctly stated what corroboration is, and that mere opportunity to have committed the crime is not sufficient corroboration. But the court added that opportunity is a sufficient corroboration if the jury further found from the evidence "and to your satisfaction that such opportunity was sought and brought about for the purpose of the commission of the offense." This does not say, in terms, that corroboration must be established beyond reasonable doubt, but is a statement that same may be established by evidence which is to the "satisfaction" of the jury.

In instruction 10 the jury was told that the state has offered Exhibits 11 and 12 as being corroborative of the testimony of the

prosecutrix, and that, "in order for said exhibits to be considered by you as corroborative of the prosecuting witness' testimony, it will be necessary for the state to have shown by a preponderance of the testimony that said exhibits are in the handwriting of the defendant, or that they were delivered to the prosecuting witness by the defendant, or that they were placed by the defendant in a box or place agreed upon between the defendant and the prosecuting witness in which the correspondence between said parties was to be placed and was to be received therefrom by said parties respectively," and that, unless "the state has established by a preponderance of the testimony one or more of said conditions in reference to said exhibits, then you are instructed that it is not entitled to your consideration, and you should wholly disregard it." Next is charged that, if the jury believes "from the testimony, and from a fair preponderance thereof, that the state has shown either of (the matters before stated), ... then in such case, if you so find the facts to be, you will be entitled to consider the said exhibits in evidence and as corroborative of the testimony of said prosecuting witness."

This instruction tells the jury in the plainest and clearest of terms that they may find the testimony of the prosecutrix has been corroborated if the corroboration has been established "by a preponderance" or by "a fair preponderance of the testimony." That is not the law. The corroborative evidence is precisely as essential as the primary evidence, and both must be established, not by a preponderance or even a fair preponderance, but beyond reasonable doubt.

. . . . . .

Reversed.

TWEEDY *v.* STATE

Supreme Court of Iowa, 1857. 5 Iowa 433.

The defendant, having been found guilty of manslaughter and sentenced to five years in the penitentiary, sued out a writ of error.

WRIGHT, C. J.—During the progress of the trial in the court below various exceptions were taken to the rulings and decisions there made, which are now assigned for error. Without intimating an opinion upon many of them, we shall briefly refer to a few of those brought to our attention. It seems that there was testimony tending to show that defendant had acted in self-defense. Upon this subject the court instructed the jury as follows: *First.* "The facts of excuse, or self-defense, must be proven to the minds of the jury, clearly *and beyond a reasonable doubt,* otherwise they must find the

defendant guilty of murder or manslaughter." *Second.* "If the jury find that the defendant did kill the deceased, they must be convinced, beyond a reasonable doubt, of the truth of the facts offered in justification of the killing; and unless other justifying facts have been proven, they must be satisfied, *beyond a reasonable doubt,* that the deceased did attack the defendant with a deadly weapon, *and drive him to the wall,* before defendant can justify."

Several other instructions, embodying substantially the same principles, were given, and others, as asked by defendant upon the same subject, were refused. Without giving them, however, we shall consider those above set out, our views thereon sufficiently indicating the opinion entertained upon the general subject. We think these instructions were clearly erroneous. In criminal cases, the rule is, that the person charged is presumed to be innocent until his guilt is proved. If, upon a consideration of all the evidence, there be a reasonable doubt of his guilt, the jury are to give him the benefit of such doubt. What is meant, or what will amount to such reasonable doubt, we need not at present consider. If, however, the prisoner shall concede the fact of the killing, or if it be found that he is the author of the homicide, and he relies upon matter in excuse or justification of the act, the inquiry arises, whether he must prove such matter beyond a reasonable doubt. Whatever the rule may be, where he relies on some distinct substantive ground of defense, not necessarily connected with the transaction upon which the indictment is founded (such as insanity), we know of no case that has gone so far as to hold that where the defense is confined to the circumstances accompanying the original transaction (as that he acted in self-defense) that he must prove such justification beyond a reasonable doubt.

In criminal cases, the jury, in finding their verdict, do not *weigh* the evidence in the sense that they are required to, and do, weigh it in civil cases. In the one class of cases they are to weigh it carefully, and decide according to its preponderance, although it may not be free from reasonable doubt. In criminal cases, however, neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate a full belief of the fact, to the exclusion of all reasonable doubt. 3 Greenleaf Ev., section 29; Whart. American Crim. Law, 327. Now, applying this rule to the defense contemplated by this instruction, taking for the present the strongest view of it against the prisoner, and how does it stand? He is presumed to be innocent. This presumption, says the prosecution, is rebutted and removed,

when it is found or conclusively established that he was the author of the homicide. Grant this, and that he does then stand in the attitude of guilt. Then, it seems to us, that if the circumstances, whether proven by him, or the State, preponderate even, in favor of the matter in excuse or justification, there instantly arises a reasonable doubt of his guilt, and an acquittal should follow. Whereas, if he is required to establish such defense, beyond a reasonable doubt, then most manifestly they should entertain a reasonable doubt of his guilt. And this process of reasoning is quite as favorable certainly, as the state could ask; and yet, by this it must be obvious that the instructions were erroneous.

But we need not stop here, for the prisoner in such cases is entitled to even a more favorable rule. The defense of the defendant related to and grew out of the transaction, or *res gestae*, which constituted the supposed criminal act. To establish it, he was not required to, and need not assume to prove anything aside or out of the case, on the part of the government. He had a right to claim and insist, that taking the facts and circumstances all together, as proved on both sides, he was not shown to be guilty; and if the facts constituting the transaction, on which the prosecution rested, did not prove beyond a reasonable doubt that he committed the offense with which he was charged (or one necessarily included in it), he was entitled to an acquittal. To constitute the crime of murder, the prisoner must have killed the person named in the indictment, with malice aforethought, either express or implied. If the killing was justifiable, then there was no malice aforethought; it was not murder—nor was it manslaughter. Now, if the evidence fails to show that the act was unjustifiable, or, if that question is left in doubt, how can it be said that the criminal act is proved, or that the jury should not acquit? The defendant has a right to claim, when the evidence relates solely to the original transaction, and forming part of the *res gestae*, that the proof so made does not make manifest his guilt, because it is left in doubt whether the act was committed under unjustifiable circumstances. And thus we see that he is not driven to the necessity of establishing the matter in excuse or justification, by a preponderance of evidence, much less beyond a reasonable doubt; and that proof of the killing will not change the burden where the excuse or justification is apparent on the evidence offered by the prosecutor, or arises out of the circumstances attending the homicide. *Commonwealth* v. *McKee*, 1 Gray, 61; *Same* v. *York*, 9 Metcalf, 116; *Same* v. *Webster*, 5 Cush., 305. If, upon a consideration of all these circumstances, the jury enter-

tain a reasonable doubt of any fact essential to establish the guilt, this doubt should be solved in favor of the prisoner, and they should acquit.

The foregoing remarks apply to the first, and a portion of the second instruction. But the jury were also told, that "unless other justifying facts have been proven, they must be satisfied, beyond a *reasonable doubt,* that the deceased did attack the defendant with a deadly weapon, and *drive him to the wall,* before the defendant can justify." Upon what principle this instruction can be sustained, it is impossible for us to understand. However the rule may have been at one time, it is certainly now well settled that the prisoner is not compelled to flee from his adversary, who assails him with a deadly weapon, and go to the wall, as it is termed, before he can justify the homicide. And much more clearly is it true that the prisoner need not satisfy the jury, *beyond a reasonable doubt,* that he did go to the wall, before he can justify. If this was the rule, it would be next to impossible for any man to successfully urge such a defense. Though the danger might be ever so actual and imminent—though his efforts to escape a conflict might be all that his personal safety could reasonably dictate—still, if the jury entertained a reasonable doubt whether he had retreated as far as he could, they would be bound to convict. Such a rule is contrary to every correct idea of the right of self-defense, and finds no support either from authority or reason.

Without further enlarging upon propositions that are, to our minds, so clear, we conclude that the judgment must be reversed, and a trial *de novo* awarded.

STATE *v.* HARRISON

Supreme Court of Iowa, 1914. 167 Iowa 334, 149 N. W. 452.

From a judgment of conviction of the crime of assault with intent to commit rape the defendant appealed.

DEEMER, J . . . .

V. An instruction given by the court with reference to defendant's drunken condition at the time of the assault reads as follows:

The defendant, as one of his defenses, says that at the time of the commission of the alleged crime as charged in the indictment the defendant was drunk. You are instructed that if you find from the evidence that the defendant, at the time of the alleged assault, was in such a state of drunkenness or intoxication that he was incapable of forming an intent to ravish the said Capitola Koble, then defendant would not be guilty of assault with intent to commit rape;

and you will then determine whether or not defendant, by reason of drunkenness or intoxication, was incapable of forming an intent to commit one of the lesser crimes included in the charge and defined in these instructions, and if you find the defendant was, at the time of the alleged assault, in such a state of drunkenness or intoxication as to render him incapable of forming an intent to commit assault and battery, or simply assault, then you should find the defendant not guilty.

The defendant asked the following with reference thereto:

You are instructed that you may take into consideration the fact, if you so find it to be a fact, that the defendant, at the time he made the assault, if you find he made one, was intoxicated, or had been drinking, so that he did not have possession of his full mental or physical faculties; such testimony being admissible, and you are entitled to consider it, on the question of whether or not the defendant had or could form the intent to commit the crime charged. One intoxicated cannot, within the meaning of the law as applied to cases of the kind at bar, have such intent as to make him guilty of the crime charged. This, regardless of how brutal or uncalled-for his acts and conduct might be.

This latter was refused, and it is now contended that the one given is erroneous: (1) In that "drunkenness" is not a defense, but inheres in the charge itself; (2) that it cast the burden on defendant of proving his intoxication; and (3) that it is erroneous in requiring the jury to find that by reason of intoxication defendant was unable to form an intent; whereas, the test, as appellant contends, is whether or not defendant was so far under the influence of liquor that he was incapable of distinguishing the right or wrong of what he did. That the last point made against the instruction is without merit is squarely held in *State* v. *Donovan,* 61 Iowa 369. The instruction does not in terms refer to the burden of proof, but simply undertakes to explain what degree of intoxication would exculpate the defendant, and this degree was, as we have already said, correct. In other instructions the court placed the burden upon the state of proving defendant's intent to commit the offense by the evidence beyond all reasonable doubt.

It is true, as defendant contends, that, strictly speaking, drunkenness is not a defense, although such a phrase is in common use. Properly speaking, it is in some cases an excuse, which relieves the defendant from punishment. In other words, it tends to rebut the case made by the state; but it is not, strictly speaking, defensive, save as insanity or alibi are defensive. In that sense the burden is

upon the defendant to establish the claim by a preponderance of the testimony. *State* v. *Reed,* 62 Iowa 40; *State* v. *Hamilton,* 57 Iowa 598; *State* v. *Bruce,* 48 Iowa 530; *State* v. *Felter,* 32 Iowa 49; *State* v. *Mewherter,* 46 Iowa 88; *State* v. *Trout,* 74 Iowa 545; *State* v. *Robbins,* 109 Iowa 650.

Upon such an issue tendered by the defendant the burden is upon him to establish the excuse. *State* v. *Sparegrove,* 134 Iowa 599; *State* v. *Yates,* 132 Iowa 475; *State* v. *Pasnau,* 118 Iowa 501.

Defendant asked no instruction as to the burden on the whole case, in view of the testimony as to drunkenness; but the trial court gave the usual one on reasonable doubt, as heretofore suggested, and told the jury that the state must prove defendant's unlawful intent beyond a reasonable doubt. There was no error in the instruction given.

VI. The instruction as to reasonable doubt is challenged. It conforms to the rules announced in *State* v. *Ostrander,* 18 Iowa 459, and *State* v. *Phillips,* 118 Iowa 660, 675, and there was no error.

Finding no error, the judgment must be, and it is—

Affirmed.

SECTION III

CORPUS DELICTI

STATE *v.* WINTNER

Supreme Court of Iowa, 1887. 72 Iowa 627, 34 N. W. 475.

The defendant appealed from a judgment of conviction of the crime of manslaughter.

REED, J. . . . .

III. The state was permitted, against defendant's objection, to introduce in evidence the jacket and shirt worn by the deceased at the time of the shooting. It is insisted that there was no controversy as to the fact of the killing, and that the only effect of exhibiting to the jury the clothing worn by the deceased, and which was stained with his blood, was to arouse their prejudice. It may be true that but little question was made on the trial as to the fact of the killing; still the burden was on the state to prove that fact. Defendant's plea of "not guilty" put in issue every allegation of the indictment, and, if the prosecutor had failed to prove the killing, defendant would have been entitled to an acquittal. As the prosecutor was required to prove that fact, he had the right to introduce any competent evidence which tended to prove it. The clothing showed the location of the wound, and its consequent fatal character. It was therefore competent evidence of the fact.

. . . . . .

Affirmed.

STATE *v.* MILLMEIER

Supreme Court of Iowa, 1897. 102 Iowa 692, 72 N. W. 275.

The defendant appealed from a judgment of conviction of the crime of arson.

DEEMER, J. . . . .

III. The only proof of the *corpus delicti* is that a barn belonging to Hoenig, and used by George Millmeier, was burned between 11 and 12 o'clock in the evening of November 24, 1895; that defendant, during a period covering two or more years, had made various threats against the owner and occupant; that, about a week after the fire, footprints similar in size and shape to his were found at or about the burned building, which led up to and in the immediate vicinity of his premises; and that he made various and contradictory statements as to his whereabouts on the evening the barn was burned. Counsel do not agree as to what constitutes "*corpus delicti*," and we find that courts are as far apart as counsel in defining the term. The expression means, primarily, the "body of the offense." But, in applying it, courts and text writers have not at all times agreed as to what is meant by the "body of the offense." In our opinion, the term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one. It is made up of two elements: *First*, that a certain result has been produced, as that a man has died, or a building has been burned, or a piece of property is not in the owner's possession; *second*, that some one is criminally responsible for the result. *Ruloff* v. *People*, 18 N. Y. 179; *People* v. *Bennett*, 49 N. Y. 137; *Winslow* v. *State*, 76 Ala. 42; *Pitts* v. *State*, 43 Miss. 472; *People* v. *Palmer*, 109 N. Y. 113 (16 N. E. Rep. 529). Applying this rule to an arson case, we held in *State* v. *Carroll*, 85 Iowa 1, that there could be no conviction without satisfactory proof that the building was feloniously, wilfully, and maliciously burned by some one, and was not an accidental burning. Direct evidence to establish either of these elements is not required, but, where circumstantial evidence is relied upon, it must be of the most cogent and irresistible kind. *State* v. *Keeler*, 28 Iowa 551.

In this case the burning of the barn is established by direct evidence, but there is no proof other than circumstantial that it was feloniously set on fire. The circumstances relied upon to prove that it was wilfully and maliciously burned are, as a rule, those which tend to connect the defendant with the commission of the crime. That such circumstances may be considered in proving the *corpus delicti* seems to be well settled. *Carleton* v. *People*, 150 Ill. 181 (37

N. E. Rep. 244). These facts, then with some others, appear in evidence, which tend to prove that the building was fired by some one maliciously and feloniously. The building was uninhabited. It stood away from any building in which fire was used. A rainstorm commenced early in the evening of the night of the fire, which changed to sleet, and finally to snow. The defendant had been making threats against both the owner and occupant of the building, and was hostile to each of them. He made contradictory statements as to his whereabouts on the evening in question. He was last seen about ten or half past ten o'clock in the evening of the day the fire occurred, in Ft. Madison. The barn in question was between Ft. Madison and his house, and he could pass it on returning home without going far out of his way. On the forenoon of the day of the fire, he passed the barn which was burned, and remarked to a companion about it, and in the same connection said he was going to get even with the man who was using it. As soon as the snow went off the ground, which was within a week following the fire, footprints similar in size and style to those made by defendant were found leading from near the barn to or near the gate leading to the defendant's premises. After the preliminary examination of defendant, he tried to intimidate and frighten some of the witnesses who had testified against him. These are the main circumstances relied upon by the state to prove that a crime was committed, and, in our opinion, they are sufficient; for, as said in the case of *Sawyers* v. *Commonwealth,* 88 Va. 556 (13 S. E. Rep. 708), at page 559, 88 Va., and page 709, 13 S. E. Rep., "Among the chief *indiciae* which go to substantiate at once the *corpus delicti* and the guilt of the prisoner in a case like this, say the authorities, are the circumstances that the fire broke out suddenly in an uninhabited house, or in different parts of the same building, and that the accused had a cause of ill will against the sufferer, or had been heard to threaten him." The cases of *Brooks* v. *State,* 51 Ga. 612; *Carlton* v. *People,* (Ill. Sup.) 37 N. E. Rep. 244; *State* v. *Halleck,* (Wis. 26 N. W. Rep. 572; and *People* v. *Eaton,* (Mich.) 26 N. W. Rep. 702,—are not stronger than the one at bar, and in each and every case a verdict of guilty was sustained.

IV. Some of the instructions are complained of. We have examined them all with care, and discover no error. As we have seen, threats made by the accused against the person or property of the prosecutor may be shown, not only to prove the existence of malice, but to connect the accused with the commission of the offense. See *People* v. *Eaton* and *People* v. *Lattimore, supra;* also, *State* v. *Day,*

79 Me. 120 (8 Atl. Rep. 544); *Bond* v. *Commonwealth*, 83 Va. 581 (3 S. E. Rep. 149). The court, in effect, so instructed the jury. It also instructed that they must find beyond all reasonable doubt that a crime was in fact committed. This covered the *corpus delicti*, and was sufficient. The court also fully instructed as to the law of circumstantial evidence, and the charge, as a whole, fully and fairly presented the law.

V. Appellant's counsel also argue that, conceding the *corpus delicti* to have been proven, there is not sufficient evidence to convict the defendant of the commission of the offense. As there is to be a re-trial of the case, it is better that we express no opinion upon this point. Some other errors are assigned, which need not be considered, as they will not arise upon a re-trial. For the error pointed out, the judgment is *Reversed.*

STATE *v.* RODMAN

Supreme Court of Iowa, 1883. 62 Iowa 456, 17 N. W. 663.

The defendant, having been convicted of the larceny of a horse, appealed.

BECK, J. . . . .

V. It is insisted that the evidence fails to support the verdict, in that it is not shown that the horse in question was stolen. The evidence shows that the horse was put in a stable at night and next morning was gone. Counsel insist that, as the evidence fails to show that the animal was secured in the stable, it might have escaped. The evidence, as counsel argue, fails in not showing that the horse was in some manner "fastened in the stable." The evidence shows *prima facie*, at least, that the animal was stolen. If it was not "fastened in the stable," defendant could readily have shown it. But he elicited no evidence upon the point. We think upon all the evidence that the verdict of the jury is sufficiently supported. We have considered all questions raised in this case. The judgment of the district court must be *Affirmed.*

SECTION IV

WITNESSES

STATE *v.* DONOVAN

Supreme Court of Iowa, 1875. 41 Iowa 587.

The defendant was convicted of the crime of keeping a house where intoxicating liquors were sold unlawfully. The defendant's wife was joined with him in the trial but only the defendant was convicted. He appealed.

BECK, J. Upon the trial the appellant introduced his wife, who was indicted and on trial with him, as a witness in his behalf, and offered to prove by her that he did not, at the time and place charged in the indictment, keep a house where intoxicating liquors were unlawfully sold, and fighting, drunkenness, etc., were permitted. The witness was not allowed to testify, on the ground that her evidence would be in her own favor.

A wife may be a witness for her husband in a criminal case. Code, section 3642. And when two or more are jointly indicted and tried, each may have the evidence of his co-defendants, as though he were tried separately. *The State* v. *Gigher,* 23 Iowa 318. In such cases the evidence given by the co-defendants must be restricted, so that it will not operate to their benefit. Under these rules, the evidence of the wife ought to have been admitted. It did not necessarily apply to the case against herself, for it does not follow that if defendant did not keep a house of the character charged in the indictment, the wife was not guilty of the offense. Had the evidence been admitted, and the jury properly instructed as to its application and effect—that it could only have been considered by them in determining the guilt or innocence of defendant, she could have derived no benefit from it.

As the judgment must be reversed for the error pointed out, the case need not be further considered.

Reversed.

STATE *v.* KELLY

Supreme Court of Iowa, 1882. 57 Iowa 644, 11 N. W. 635.

From a judgment of conviction of the crime of larceny the defendant appealed.

BECK, J. . . . .

III. The prisoner gave the following and other testimony in his own behalf. "I got that steer from Jim Garren's yard. Garren lives about a mile southeast from our place. Garren hired me to take the steer. This was about two days, I think, before I took the steer. It was in the evening he hired me." Defendant then proposed to state the conversation had between himself and Garren at that time, but upon objection by the state the evidence was excluded, the court holding that the defendant could not testify to the conversation had with Garren, but it was competent for him to testify to the "arrangement" made between them. Thereupon the prisoner testified as follows: "Yes, there was an arrangement. I was to drive this steer down here from home, and get two dollars

for driving it down and selling it for him. I was to take the steer in a couple of days, and I did. I took the steer about one or two o'clock at night and Jim Garren helped me drive it part way. I got to town about daylight. I drove the steer to the barn, then went to Green's hotel; no one up, I called my brother; he got a rope and we tied the steer up. I sold the steer to Mr. McConnell for about $24, and gave the money to Jim Garren that evening; I gave it all to him and he paid me $2. . . . . I did not get the steer at Coleman's herd; when I saw the steer at Garren's yard I did not know whose it was; he did not say; Garren selected the steer out of the yard to be driven here."

The rules relating to the competency of testimony given by other witnesses are applicable when the prisoner testifies in his own behalf, and the fact that the evidence against him is strong and his story improbable can have no bearing upon the question of the admissibility of the testimony proposed. We are to apply the rules recognized by the law without regard to the particular merits of the case before us.

In criminal cases all circumstances connected with a transaction tending to show the guilt or innocence of the accused, which bear upon its character and tend to disclose the *animus* of the parties, are regarded by the law as a part of the transaction itself, and are competent evidence. In the absence of a knowledge of such circumstances, incorrect and unjust conclusions may be reached touching the motives and intentions of the parties to the transaction. These attending circumstances are in the language of the law denominated *res gestae,* and are always to be received in evidence and considered with the principal fact or transaction. The defendant's guilt in this case, in view of his own testimony, depends upon his knowledge that Garren had no right to the possession of the steer and that it was stolen property. If this element is not in the case he is innocent. He ought, therefore, to have been permitted to testify as to his knowledge upon this subject, derived from his conversation with Garren. If he was induced to believe by the declarations and statements of Garren, that he had a right to the possession of the steer and authority to employ defendant to sell it, and statements of Garren to that effect would be proper to consider in determining whether defendant entertained such belief, he was innocent of crime. Evidence of this character would have accounted for his possession of the stolen property. These conclusions are based upon the most familiar rules of evidence and are supported by the clearest reason. See *Muck* v. *The State,* 48 Wis., p. 271.

For the error in refusing to admit the evidence above considered the judgment of the District Court must be

Reversed.

STATE *v.* McKAY

Supreme Court of Iowa, 1904. 122 Iowa 658, 98 N. W. 510.

DEEMER, J.—The indictment charges that defendant did upon Ida Kraft, a female child under the age of fifteen years, make an assault, and then and there carnally knew and abused her, contrary to the statutes, etc. Evidence was introduced by the state tending to prove these allegations, and, among other witnesses, it called Ida McKay, the wife of the defendant, who, it appears, was the person upon whom the alleged assault was made. At the time the rape is said to have been committed, she was not defendant's wife, but was married to him on October 24, 1902, by the mayor of the town of Mapleton. Defendant objected to the competency of the witness, but his objection was overruled, and she proceeded to give in detail all the circumstances of the alleged assault upon her.

Code, section 4606, reads as follows: "Neither the husband or wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action, or proceeding one against the other or in a civil action by one against a third party for alienating the affections of the other; but in all civil cases and in criminal cases they may be witnesses for each other." The state contends that this section does not apply, for the reason, first, that there is no showing that Ida Kraft and the defendant were legally married at the time she was called as a witness; and, second, for the reason the facts in this case bring it in within the exceptions pointed out in the act in question, in that the crime of the husband was against the wife.

As to the first question, reliance is placed upon the fact that the mayor performed the ceremony outside of his jurisdiction; that is to say, without the limits of the incorporated town of Mapleton. There is nothing in this point. Ceremonial marriages are not required in this state. The marriage between these parties was valid, although the mayor may not have been authorized to perform the ceremony outside the limits of his jurisdiction. That all parties may have been subject to a penalty for not complying with the statute does not affect the validity of the marriage. While there may not have been a proper ceremonial marriage, yet section 3147 of the Code expressly provides that marriages solemnized with the consent of the parties in any other manner than prescribed by the Code for ceremonial marriages are valid. This means something

more than a common-law marriage, or marriage by co-habitation and repute. Such a marriage as was here shown need not be followed by co-habitation, to make it valid and binding. *In re Hulett's Estate,* 67 Minn. 475 (69 N. W. Rep. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419).

There is no doubt that the witness was defendant's wife when she was called to give testimony against him, and that she was incompetent, under the statute quoted, unless it be found that this is a criminal prosecution for a crime committed by one against the other. This exception, taken from the statute, of course, means a crime of the husband against the wife, or the wife against the husband, while they occupy that relation. There cannot be a crime one against the other unless the relation exists. In other words, a crime committed against one who is not at the time the spouse of the other is not a crime of husband against the wife, or of wife against the husband. This is so plain that no amount of reasoning can make it any clearer. When the crime charged in this case was committed, Ida Kraft was not defendant's wife, but when she was called as a witness she was. By reason of her then relation she could not be a witness against her husband, except in a criminal prosecution for a crime committed by her husband against her—his wife—as such.

Moreover, the alleged offense, in so far as the wife is concerned, was condoned by her subsequent marriage to the offender. Doubtless this condonation should not be held a bar to a criminal prosecution, notwithstanding the marriage; but the offense, whatever it was, was so far condoned by the woman upon whom it was committed that it cannot be said it was a crime committed one against the other, and therefore within the spirit, if not within the letter, of the statute. But we need not pursue this thought further, for it is clear that the facts do not bring the case within the exception named in the statute.

Our conclusions find support in the following among other cases: *People* v. *Curiale,* 137 Cal. 534 (70 Pac. Rep. 468, 59 L. R. A. 588); *State* v. *Evans,* 138 Mo. 116 (39 S. W. Rep. 462, 60 Am. St. Rep. 549); *State* v. *Frey,* 76 Minn. 526 (79 N. W. Rep. 518, 77 Am. St. Rep. 660); *Miller* v. *State,* 37 Tex. Cr. R. 576 (40 S. W. Rep. 313); *People* v. *Schoonmaker,* 117 Mich. 191 (75 N. W. Rep. 429, 72 Am. St. Rep. 560); *People* v. *Vann,* 129 Cal. 118 (61 Pac. Rep. 776).

For the error in allowing the wife to testify, the judgment must be, and it is,

Reversed.

STATE *v.* SHERIDAN

Supreme Court of Iowa, 1903. 121 Iowa 164, 96 N. W. 730.

WEAVER, J. The defendant, an ice dealer, was charged with having maliciously injured or destroyed a quantity of ice belonging to a competitor in business by putting upon it a large quantity of salt. The prosecuting witness claiming that his ice had been maliciously destroyed, and, having been informed that appellant bought a barrel of salt from a local merchant a day or two before that date, filed a preliminary information before a justice of the peace, and caused a warrant to issue for the appellant's arrest. At the same time the prosecuting witness filed an affidavit alleging the purchase of salt by appellant, and stating his belief that said salt was used in perpetrating the act of malicious mischief above mentioned, and that "said salt, or the barrel in which it was contained," was in the possession of appellant at his residence in Rock Rapids. On these allegations he asked for a warrant to search the appellant's residence and seize the described articles if found. A search warrant was thereupon issued, and the officer, in executing it, claimed to have found in the cellar of appellant's residence an empty salt barrel. On the trial in the district court the officer, as a witness for the state, identified the barrel so found, and said article was then offered and admitted in evidence over appellant's objection. The correctness of this ruling is the principal question discussed by counsel. Our state Constitution (article 1, section 8) guarantees the security of the people in their right to be exempt in their persons, houses, papers, and effects from unreasonable searches and seizures. Section 9 of the same article provides that no person shall be deprived of life, liberty, or property without due process of law. Under these provisions we have lately held that the admission of evidence procured by wrongful and forcible examination, by the officers of the state, of the person of one accused of crime, was reversible error. *State* v. *Height*, 117 Iowa 650. The principle involved was there very thoroughly discussed, and the authorities carefully reviewed, and, so far as the same are applicable here it is unnecessary to again present them. We shall therefore confine our inquiry upon this branch of the case to the point whether the question now before us falls within the scope of the doctrine announced in that decision.

It is conceded by the Attorney General that the search warrant was issued without the authority of law, and that the search and seizure made thereunder were wrongful. It was also shown by the evidence upon the trial, and without dispute, that the search warrant was asked for, procured, and served for the sole "purpose of

obtaining testimony'' against the appellant. For the purposes of this appeal we may admit it has often been held that the mere fact that evidence has been developed by the wrongful act or trespass of an officer or any other person will not necessarily render it inadmissible, but we are confronted by the further fact that the evidence objected to was obtained by a palpable abuse of judicial process. In the *Height Case,* we said that, while an officer may properly testify to criminating facts discovered by him in the execution of a warrant lawfully issued, yet ''a party to a suit can gain nothing by virtue of violence under the pretense of process, nor will a fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and positions they possessed before they were deprived thereof by the fraud, violence, or abuse of legal process. . . . . The search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever which will justify it.'' To the same effect, see *Reifsnyder* v. *Lee,* 44 Iowa 101. The last quoted clause applies with equal force to the present case. The search was for the mere purpose of securing evidence by the invasion of the private residence of the defendant. The sacredness of his person against such an act is protected by no higher or stronger guaranty than that of his home, his papers, and effects. In *Boyd* v. *The United States,* 116 U. S. 616 (6 Sup. Ct. Rep. 524, 29 L. Ed. 746), the constitutional prohibition of unreasonable searches and seizures is said to be closely related to the immunity which the citizen enjoys against being compelled to bear witness against himself, and it is there held that the compulsory production by the defendant of an article to be used in evidence against him in a prosecution for crime or enforcement of a penalty is, in effect, a violation of that constitutional provision. If in that case, instead of ordering the defendant to produce the desired article or paper, the court, without authority of law, had issued a search warrant, under which the sheriff invaded the private room or safe of the defendant, and thus obtained the means of securing his conviction, would not the violation of the constitutional guaranty have been as palpable, and the admission of the evidence thus secured as clearly erroneous, as was the method actually employed?

It is said, however, that the court will not inquire how the offered evidence has been procured, and, even if obtained by a search warrant in violation of the defendant's constitutional or legal rights, it will still be admitted, if otherwise competent; and that defendant's only redress is an action for damages against the officer or person committing the trespass. It is true there are cases giving seeming

support to this doctrine, but most of them, when examined, will be found to be instances in which the incriminating evidence has been discovered by persons acting without color of authority, or by officers as the incidental result of the service of a warrant of arrest or other writ or process legally issued. None can be found, we think, where the state has been permitted to obtain a search warrant in confessed violation of law, and thereby take papers or property from the home of the man suspected of the crime, and use the matter thus procured in securing his conviction. To so hold is to emasculate the constitutional guaranty, and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures. We think the evidence should have been excluded.

II. One Haley was sworn and examined as a witness for the state. He was later recalled on behalf of the defendant. On cross-examination he was asked by counsel for the state: "Q. Did you have any talk with Ed Tressler in the privy back of Wagner's saloon, while the grand jury was in session at this term of court, wherein you told Ed Tressler that you knew all about that ice deal, and that you would tell the whole thing, whether your brother Jack was against you or not? Q. Didn't you state in my office, and in the presence of Ed Tressler, while the grand jury was in session, and just before you were called as a witness before the grand jury, that you knew all about the ice deal, and you would be willing to tell it?" The appellant's objection to these questions as being immaterial and not cross-examination were overruled, and the witness answered each in the negative. The state was then permitted to recall Tressler, who testified, over timely objections, that Haley did make the statements referred to. This, we think, was error. It is an elementary rule that a witness cannot be impeached upon a collateral or immaterial matter. Such was clearly the character of this testimony. It had no relevance to the matters stated by the witness in his testimony in chief, and therefore was not cross-examination. The alleged statements were not made by the appellant, nor by the witness in his presence. They were, in effect, a declaration that the witness knew "all about the ice deal," and would tell the truth about it. Assuming that he so said, it had no tendency direct or indirect to incriminate the appellant. The state would not have been entitled to prove it as a part of its case. It was both collateral and immaterial, and should have been excluded.

The judgment of the district court is reversed, and cause remanded for a new trial.

Reversed.

SECTION V

COMPLAINT

STATE *v.* DRISCOLL

Supreme Court of Iowa, 1887. 72 Iowa 583, 34 N. W. 428.

The defendant appealed from a judgment of conviction of the crime of robbery.

SEEVERS, J.—The prosecuting witness testified, in substance, that he went into a saloon in Dubuque, and inquired for a place to stay all night. The bar-keeper told the witness that defendant and another person would take him to a boarding house. All three of them left the saloon together about eleven o'clock at night. They went down to a lumber yard near a railroad track, when, the prosecuting witness testified, the defendant and the person with him assaulted and robbed the witness. He testified that he threw $10 away at the time he was assaulted. Witness went to the railroad and met three men with lanterns. All of them went to the place of the robbery, and found the $10, and then went in search of a policeman. One of said men was C. Ohde, who was a witness for the state, and testified that the prosecuting witness said that the men who robbed him "wanted to show him a place where a boarding-house was by the railroad." Carney, a witness for the state, testified that he saw the prosecuting witness and several persons with "two or three railroad lights" coming "towards him, and thought some one was hurt. One of them said they were looking for a policeman; told them I would go with them. They said a man, I don't know which man, and the prosecuting witness said he had been robbed by two men that came from the saloon. We were then in front of it." The policeman testified that the prosecuting witness's face and shirt were bloody, and that his vest was open. Prosecuting witness told the policeman he "had been robbed" by "two men in the lumber yard near the railroad track," and that they were "two men he had met in the saloon." To all of the foregoing evidence of the declarations of the prosecuting witness the defendant objected, but the objection was overruled.

It is contended that the court erred in admitting the foregoing evidence, for the reason that it was hearsay. On the other hand, the state insists that the evidence constituted a part of the *res gestae,* and was therefore admissible. It will be observed that the length of time which had elapsed between the robbery and the several declarations is not stated. But we think that what may well be designated the pursuit of the robbers immediately followed the

robbery, and was a part of that transaction. The prosecuting witness made immediate outcry, and in the effort to arrest the robbers the declarations were made; and we think, therefore, they are a part of the *res gestae*, and therefore admissible. The declarations were made soon after the robbery, and were explanatory thereof, and of the pursuit then in progress. No two cases are exactly alike, and no general rule can be adopted which is applicable to all cases. To a certain extent, at least, the facts and circumstances of each case must be considered, and in the trial court a legal discretion must be reposed, and we cannot say that such discretion has been abused. Indeed, the facts and circumstances are much like those controlling in the following cases. *Com.* v. *McPike*, 3 Cush., 181; *Driscoll* v. *People*, 47 Mich. 413 (419); S. C., 11 N. W. Rep., 221; *People* v. *Vernon*, 35 Cal. 49; *Harriman* v. *Stowe*, 57 Mo. 93; *Travelers' Ins. Co.* v. *Mosley*, 8 Wall., 397. The evidence clearly, in our opinion, justifies the verdict.

Affirmed.

STATE *v.* PETERSON

Supreme Court of Iowa, 1900. 110 Iowa 647, 82 N. W. 329.

Having been convicted of rape, the defendant appealed.

DEEMER, J. The prosecuting witness, a German girl of but fifteen years of age, was followed by defendant from a store, whither she had gone to procure some groceries for a family for whom she was working, for a distance of about half a mile, to a turn in the road which witness was following, that was some distance from any house or building where people were living; and the state claims that defendant then and there forcibly ravished the said witness. Defendant admits the intercourse, but denies that he used any force or violence to accomplish his purpose. The act took place after dark on the evening of November 29, 1898. It is said that the indictment is bad for duplicity, in that it charges an assault, and also a rape. We will not set it out, as it is in the usual form of indictments in such cases, and is not vulnerable to the objection stated. *State* v. *Casford*, 76 Iowa 330. The assault is charged as a part of the crime of rape, and, as there can be no rape without an assault, there is no objection to charging it as a part of the acts going to make up the offense.

II. Complaint is made of the court's rulings on objections to leading questions propounded to the prosecutrix. That the questions were leading is conceded, but the evidence tends to show that the witness was confused and in an agitated frame of mind while

on the witness stand, and we see no abuse of the discretion lodged in the trial court in permitting such questions. The trial court was better able than we to judge of the propriety of such examination, and we are not inclined to interfere unless there has been a palpable abuse of such discretion. *State* v. *Watson,* 81 Iowa 380; 1 Greenleaf Evidence, section 435; *State* v. *Benner,* 64 Me. 267. The state was permitted to show that on the next morning the prosecutrix made complaint to the people for whom she was working, and to her father, of the assault made upon her by the defendant the previous evening. Defendant claims that this complaint was too far removed in time from the principal occurrence to be received as evidence. If such testimony were admissible solely because part of the *res gestae,* this contention would be of much merit. Such complaint, however, is admissible, not solely because it is part of the *res gestae,* but because it is a fact tending to corroborate the evidence of the prosecutrix. *State* v. *Richards,* 33 Iowa 420; 3 Greenleaf Evidence, section 213; McClain, Criminal Law, section 455. Lapse of time is not, therefore, the sole test of admissibility. But the inference arising against the truth of the charge, from silence, is a matter for the consideration of the jury in determining the weight to be attached to it. *State* v. *Niles,* 47 Vt. 82; *State* v. *Nulkern,* 85 Me. 106 (26 Atl. Rep. 1017); *State* v. *Cross,* 12 Iowa 66. The delay in making complaint may be explained. *State* v. *Shettleworth,* 18 Minn. 208 (Gil. 191); *State* v. *Reid,* 39 Minn. 277 (39 N. W. Rep. 796). In the case at bar the state attempted to explain the delay by showing that a number of persons, practically strangers, were present at the house where she was working when prosecutrix arrived home, and that they remained until after bedtime. The sufficiency of this showing was for the jury. The complaints made, as admitted in evidence, were not inadmissible because they consisted of a narration of facts. All objectionable parts were stricken out on motion of the state. It is permissible for the state to give in evidence complaints made by the prosecutrix to the effect that defendant assaulted or ravished her. The exact particulars stated by her cannot, of course, be narrated, but the fact regarding which complaint is made may be stated. *State* v. *Cook,* 92 Iowa 486; *State* v. *Watson,* 81 Iowa 380; *State* v. *Mitchell,* 68 Iowa 119; *McMurrin* v. *Rigby,* 80 Iowa 325. Evidence was also received, over defendant's objection, tending to show the schooling and mental ability of the prosecutrix. This was clearly admissible. The prosecutrix was also permitted to testify that when she made complaint she exhibited certain underclothing that she had on at

the time the ravishment occurred. This underclothing was produced at the trial, and introduced in evidence. There was no error in the ruling with reference to this evidence. . . . .

Affirmed.

STATE *v.* LOWELL

Supreme Court of Iowa, 1904. 123 Iowa 427, 99 N. W. 125.

The defendant appealed from a judgment of guilty in a bastardy proceeding.

DEEMER, C. J. But two questions are presented on the appeal—one the failure of the court to give an instruction asked by the defendant, and the other the correctness of the court's ruling in denying a petition for a new trial, filed by the defendant, based upon newly discovered evidence.

The instruction asked was to the effect that, if the prosecutrix made no complaint of the alleged intercourse with defendant at any time, such fact should be taken into account as affecting her credibility as a witness. It will be observed that this is a bastardy proceeding, and not a prosecution for rape. Such being the situation, the fact that the prosecutrix made no complaint of the alleged intercourse is a wholly immaterial matter, particularly so where, as in this case, there is no such showing as would have justified a submission of the crime of rape to a jury, had the charge been rape. The sole question here is the paternity of the child. Complaints made by the prosecutrix, which are in the nature of self-serving declarations, are not ordinarily admissible. An exception to the rule prevails in rape cases, but the presence or absence of complaints in such an action as this does not come within the exception. The procedure in this form of action is that which obtains in ordinary civil actions, and the rules of evidence are the same; hence declarations of the prosecutrix are not admissible. *State* v. *Spencer,* 73 Minn. 101 (75 N. W. Rep. 893); *Ramey* v. *State,* 127 Ind. 243 (26 N. E. Rep. 818). If not admissible for her, the fact that she fails to complain should not be considered against her. Moreover, there is no such showing in the evidence as would make the alleged intercourse rape.

On another ground the judgment was

Reversed.

SECTION VI

CORROBORATION

RAY *v.* STATE

Supreme Court of Iowa, 1848. 1 G. Greene 316, 48 Am. Dec. 379.

From a conviction of larceny the defendant appealed.

Opinion by KINNEY, J. . . . .

But the assignment of errors, to which the attention of the court has been particularly directed by the argument of counsel is, that the court erred in leaving it discretionary with the jury to convict upon the uncorroborated testimony of Eurding, he being the principal felon. As it is highly important to settle the practice correctly in relation to the testimony of accomplices, we will examine the subject at some length, without being strictly confined to the instructions given.

From the testimony of Eurding, as set out in the bill of exceptions, it appears that he testified that he stole the coin, pieces of gold, bank notes, etc., named in the indictment against Ray; and that the defendant was his accomplice. That he, the defendant, and one Burge had agreed together to steal money. Ray was to find out where the money was that could be taken, and that he and Burge were to steal it. Defendant had informed him about the place, amount, and other circumstances in relation to the money stolen; and on the evening the money was stolen they had met, and the defendant had left to go to Jink's grocery near by, so that he could prove that he was not present.

To corroborate this testimony, Mrs. Eliza Tagg was sworn, who testified that Burge said, in a conversation with Ray, a day or two after the money was stolen, that Gilchrist would not get his money again; and that Ray said he would have his share of it.

This is the only testimony materially corroborative of that given by Eurding. She also states that she was living separate and apart from her husband; that Eurding was in the habit of visiting her, and that they were upon intimate terms, evidently disclosing the fact that she was the adulterous paramour of Eurding. She had also been arrested as an accomplice in the crime, and not only appears before the court under most unfavorable and suspicious circumstances, in a character which would have authorized the court in regarding her testimony with great disfavor, but she was, also, as appears to us from the record, successfully impeached.

Eurding's testimony, which was of the lowest grade, emanating from a source, of which it has been said, the law confesses its weak-

ness by resorting to testimony so foul and corrupt,—coming from a witness whose own confessions stamp him with disgrace and infamy, standing as he does in the halls of justice the accused and acknowledged perpetrator of the crime—is attempted to be counteracted by a witness but one step less in degradation than the felon himself.

Remaining, as the testimony of Eurding did, uncorroborated, it becomes important to inquire, whether a conviction upon such testimony, with slight, and, as we think, immaterial corroborating circumstances, ought not to have entitled the defendant to a new trial.

The rule appears to have prevailed in England, that an accomplice could not be permitted to testify without first obtaining an order from the court. Crim. Cir. Court Cases, p. 51. The reason of this rule is, that courts will not permit a resort to testimony so foul, unless the exigencies of the case imperiously require it; and even then they will exercise discretion with great caution, unless the witness can be corroborated with other testimony. Besides, an implied pardon is held out to the witness, which ought not to be done, unless justice can be promoted by a punishment of the greater offender by extending a pardon to the one less tainted with guilt. *The People* v. *Whipple*, 9 Cow. 709. We think the safer practice is, not to permit an accomplice to be brought into court as a witness without an order from the court for that purpose, and that the application ought to show: 1. That there is no other witness by whom the offense can be proved; 2. That the witness is not more guilty than the person on trial; and 3. That the testimony can be substantially corroborated.

Upon such application, if the court think that public justice can be promoted, crime suppressed, and the guilty punished, by extending a merciful hand to one who confesses his guilt, we think they may legally exercise their discretion by permitting the accomplice to be produced as a witness. In the case above cited, of *The People* v. *Whipple*, this question underwent an able examination.

An effort was made to introduce Strang, who had been convicted as an accomplice, as a witness against the prisoner. The motion was denied by the court, principally upon the ground that an implied promise of pardon or of judicial recommendation to executive favor would be the result of permitting him to testify. And as Strang appeared to have been an actor in the guilty drama for which the prisoner had been indicted, the court would not permit him to testify. And the learned judge says: "We are satisfied,

both upon principle and authority, that Strang, standing before us convicted as an accomplice with the prisoner, can only be admitted to testify against her at the discretion of the court; and from the facts and circumstances of the case, we are as clear that it would be an improper exercise of that discretion to admit him."

We think it clear that the accomplice, either before or after conviction, ought not to be permitted to testify without permission from the court. And when so admitted, it does not follow, as a consequence, that his testimony, of itself, is sufficient to convict.

It is a well-settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness; but the judges in their discretion will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration. 1 Greenl. Ev. 426.

Judges, observes Lord Ellenborough, in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the fact he deposes to. Roscoe's Crim. Ev. 143. Although, in England, a conviction upon the uncorroborated testimony of an accomplice may be legal, yet the courts, in the exercise of sound discretion, as appears from all the authorities, will direct the jury not to convict upon such testimony. As has been said, they can be used as witnesses in particular cases, but that in a regular system of administrative justice, they are liable to great objections. "The law," says one of the most useful writers on criminal jurisprudence, "confesses its weakness, by calling in the aid of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue that clings to the degraded transgressor." Russell on Crime, p. 67.

In the case of the *United States* v. *Jones*, 2 Wheeler's Cr. Cas. 451, the court decide that although competency may be restored by pardon, after the witness has served out his time in the state's prison, yet no credit is due to him unless he is corroborated by others, or the circumstances of the case.

In England, the courts, in some instances, have regarded the testimony of accomplices with some apparent favor. But in a country like ours, where justice is administered without fear or favor; where the high and the low, the rich and the poor, stand upon the same equality in courts of justice; where life and human liberty are guarded and protected by the government and laws with great tenacity; we know of no good reason why they should be jeopardized and destroyed upon the uncorroborated testimony

of an acknowledged felon. Public feeling or judicial necessity does not require so wanton a sacrifice of these rights, so wisely secured to every citizen in the administration of justice. And yet such would be the fearful consequences, if conviction could be procured upon the uncorroborated testimony of an accomplice. Such testimony, standing isolated and alone, contaminated by its own corruption, the court ought to instruct the jury, is not sufficient to convict. 1 Greenl. Ev. 427; Roscoe's Crim. Ev. 143; *Commonwealth* v. *Bosworth*, 22 Pick. 399.

But the testimony of the accomplice must not only be corroborated, but the corroboration ought to be as to some fact which goes to prove the offense charged against the prisoner. 2 Russell on Crime, 922; 2 Hawkins' Pleas of the Crown, 603; 1 Greenl. Ev. 427.

In Farly's case, in charging the jury, Lord Abringer said, "I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt; but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the testimony is corroborated in some material circumstance." 2 Russell on Crime, p. 963.

In the case of *The Commonwealth* v. *Bosworth*, 22 Pick. 399, the court awarded a new trial upon the ground, that although the witness was corroborated in some even material facts, yet the corroboration was not sufficient. Judge Morton lays down the rule to be, that the corroborative evidence must relate to some portion of the testimony which is material to the issue.

To prove that the accomplice had told the truth in relation to irrelevant and immaterial matters which are known to everybody, would have no tendency to confirm his testimony, asserting the guilt of the party on trial. The learned judge also states that the courts consider it their duty to advise a jury to acquit, when there is no evidence other than the uncorroborated testimony of an accomplice.

From these authorities, as well as from a careful examination of all to which we have had access upon this subject, we think we are safe in laying down the following rules:

1. That the court ought not to permit an accomplice to be sworn, without a previous application for that purpose.

2. That, as an accomplice, he stands before the court and jury in the character of an impeached witness, and as such his testimony requires confirmation.

3. That the confirmation must be in relation to some material fact about which he has testified, involving the prisoner's guilt.

4. That unless the accomplice is so corroborated, it is the duty of the court to advise the jury that his testimony is not entitled to credit or belief.

In this case the court instructed the jury, that whether the testimony of Eurding was sufficient, or insufficient, to establish the guilt of the defendant, was for the consideration of the jury; but that in the opinion of the court, the jury ought not to convict the defendant upon the uncorroborated testimony of Eurding. We think, if the testimony was not corroborated, the court should have told the jury that they should disregard it entirely; but especially should the court have granted a new trial, on a conviction on such testimony.

. . . . . .

Reversed.

STATE *v.* HALL

Supreme Court of Iowa, 1896. 97 Iowa 400, 66 N. W. 725.

From a conviction of larceny the defendant appealed.

GRANGER, J. . . . .

II. Limerick and Harris were witnesses for the state, and accomplices of defendant; and it is claimed that there is no evidence, other than their testimony, tending to connect defendant with the commission of the crime, but we think the corroboration is abundant. The property was taken to a field and secreted, under a hay barrack, by some one or more. The defendant, with Rachwitz, went there in the night, with a team, with the evident intention of removing it. It was recently stolen property, and these two men had knowledge, and the practical possession of it. That the property had been stolen and secreted, is clearly established. The presence of these men, in the night, to secretly take or look after it, certainly tended to show that they had secreted it, and also that they had stolen it; and, if so, it would be corroborative of the testimony of the accomplices. The fact of the presence of the defendant where the property was secreted is shown by the testimony of witnesses not accomplices, and it is not to be doubted. The corroboration need only be by circumstantial evidence. *State* v. *Miller,* 65 Iowa 60 (21 N. W. Rep. 181). It seems to be appellant's thought that the corroboration must be of the particular fact, or facts, testified to by the accomplice, but that is not the law. The language of the

statute is, "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." Where the offense is shown to have been committed, and the testimony of the accomplices shows the defendant the guilty party, there must be other evidence tending to show the fact that defendant did it. It is not necessary that there should be corroboration as to all material matters testified to, but evidence tending to show that any of such facts are true, is corroboration, and the jury is to judge of the weight of such corroborative evidence. *State* v. *Allen,* 57 Iowa 431 (10 N. W. Rep. 805); *State* v. *Schlagel,* 19 Iowa 169.

. . . . . .

Affirmed.

STATE *v.* COWELL

Supreme Court of Iowa, 1910. 149 Iowa 460, 128 N. W. 836.

The defendant appealed from a judgment of conviction of the crime of burglary.

LADD, J. One Miller delivered twenty-eight tubs of butter to the Chicago & Northwestern Railway Company at Audubon for shipment to New York City, and these were placed in a refrigerator car. When the car reached Des Plaines, Ill., it was discovered that a tub of this butter was missing, and the evidence, other than that of Frank Way, tended to show that it was taken from the car at Carroll. Way testified that defendant entered the car at that place and handed the tub therefrom to him, and that, after concealing it for a time, the witness sold it and divided the proceeds with the defendant. The record is void of evidence, other than that of Way, tending in any manner to connect the defendant with the commission of the offense, though there was other testimony tending to prove that the offense had been committed, such as the sale of the butter and the circumstances tending to show that the car had been opened at Carroll, and the like.

In the eleventh instruction, the court quoted section 5489 of the Code, providing that: "A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof"—and instructed that "an accomplice is a competent witness, the weight of his testimony and the corroboration thereof being left entirely to

your judgment. And it is not necessary that the accomplice be corroborated in every material fact to which he testifies, but evidence tending to show that any of the facts are true is corroboration, and where the testimony of an accomplice is corroborated by other witnesses in any material point governed by these instructions, it is sufficient to convict, and the corroboration need not be by the testimony of one or more credible witnesses; it may be corroborated by circumstances."

Manifestly, the interpretation of the statute quoted was directly contradictory to its terms. While it has often been held that the evidence may be sufficient if it corroborates some material part of the accomplice's evidence tending to connect the defendant with the commission of the offense (*State* v. *Jones*, 115 Iowa 113), in no case has the corroboration of any material point or fact not so tending to connect the accused with the offense been regarded as meeting the requirements of this statute. The instruction was erroneous, and, as the story of Way was without the corroboration exacted by law, an acquittal might well have been directed.

For the error mentioned, the judgment is reversed, and the cause remanded for another trial.

Reversed.

STATE *v.* PATTEN

Supreme Court of Iowa, 1921. — Iowa —, 182 N. W. 788.

From a conviction of robbery the defendant appealed.

Faville, J. On the morning of March 25, 1919, before banking hours, two men rapped at the door of the Iowa State Bank, located near the corner of Sixth and Locust streets, in the city of Des Moines, and obtained entrance on the pretense that they desired to make a deposit in the bank. These two men were John Keating and Robert Don Carlos. They displayed a considerable amount of money in currency and conducted themselves as though they were about to deposit it in the bank, when they suddenly turned and ordered the officers of the bank to throw up their hands. They forced the officers into a lavatory in the back part of the bank, where they locked them in, and then took about $2,300 in money, War Savings Stamps of the value of about $1,100, government bonds of the value of $15,800, and certain waterworks bonds of the value of $5,000. They placed all of this in a blue kit bag, passed out of the front door of the bank on Locust street, and then turned west and passed up the alley between Sixth and Seventh streets, north to Grand avenue. At that place they entered an automobile,

which was awaiting their arrival, and were immediately driven away in the car. They drove out through Highland Park, and after they arrived in the country the car was stopped and the driver of the car went to a farmhouse and asked permission of the farmer to drive the car down in the timber. This was done, and in the seclusion of the woods the loot which had been taken from the bank was divided into five equal parts; three parts were given to the man who drove the car, and the two men who had entered the bank took one part each. While they were in the woods they burned some of the papers that had been taken from the bank. The following Sunday, the farmer and his wife were in the woods and found a scrap of paper that had been taken from the bank, and also evidences of where other paper had been burned.

After dividing the spoils, the parties drove the car back toward Des Moines, and while driving along Forest avenue one of the tires on the automobile went down, and it became necessary to stop and replace a rear wheel with a spare wheel, which was being carried. While this was being done, the driver of the car went to a telephone and telephoned to the wife of Don Carlos to meet them in a taxi at East Twenty-Second street and Grand avenue, in Des Moines. The parties drove to this point immediately thereafter and were met by Mrs. Don Carlos in a taxi. The two robbers, Keating and Don Carlos, then left and went to a place on East Fourteenth street, where they stayed for a time, and then went to the apartments of one Lizzie Christy on West Ninth street, and later in the night departed by train for St. Joseph, Mo.

Both Keating and Don Carlos were witnesses in behalf of the state at the trial of this cause, and testified substantially as above set forth, and each testified that the appellant was the party who drove the car.

I. The question urged upon this appeal is whether or not there is sufficient evidence in the record to corroborate the testimony of these two parties and meet the requirements of section 5489 of the Code, which is as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

It must be conceded that under this statute, unless there is other evidence than that of the accomplices which shall tend to connect the appellant with the commission of the offense, the conviction

cannot be sustained, and also that the corroboration, by the very language of the statute, "is not sufficient if it merely show the commission of the offense or the circumstances thereof." There is abundant evidence in the record to sustain the testimony of these two witnesses as to the commission of the offense and the circumstances attending it. The question urged on this appeal, however, is whether there is sufficient evidence to corroborate the testimony of these two parties tending to connect the appellant with the commission of the offense.

The claim of the state was that the plans for the robbery were made at an apartment occupied by one Lizzie Christy, and that the parties met there on the morning of the robbery. The appellant testified in his own behalf that he had breakfast at Lizzie Christy's on the morning of the date of the robbery, about 7 o'clock; that Don Carlos and his wife came in and ate; and that he is not positive whether Keating came in or not.

Mrs. Hazel Lynch, a witness in behalf of the state, testified that the morning of the robbery she saw Lizzie Christy, the appellant, Don Carlos and his wife, and a gentleman at Lizzie Christy's apartment.

The witness William Curan testified that he owned a Stutz car during the month of March, which he kept at Rood's garage, and loaned it to the appellant a number of times. He could not say positively that he loaned it to the appellant the day of the robbery, but that appellant had it several times about that date; that at one time about that date, when the appellant returned the car, there was something wrong with the hub cap on a rear wheel, and appellant told the witness that he had changed the tire on the car and that the threads did not go back in place. The witness took the car to Rood's garage this time when appellant brought it back, and got a new hub cap and had it fixed.

The proprietor of the garage testified that the Curan car was in the garage on the 25th day of March for repairs, and that the extra wheel was fitted on the spindle at that time, and that this took place after dinner.

Mrs. Don Carlos testified that the morning of the robbery she received a telephone message from some man, who asked her to meet her husband on the East side, and that she went in a taxi; that she saw the appellant on the street, and he told her to meet her husband up the street; that she went up the street and met her husband and Keating.

The deputy sheriff testified that while the appellant was in jail

he talked with him in reference to the robbery and the recovery of the bonds, and that appellant said to him:

"I will tell you what I will do and what I can do. I can get back between $12,000 and $15,000 worth of bonds."

He testified that appellant said this would include the water-works bonds and Savings Stamps, and that they would be returned providing the case was dismissed against him and Lizzie Christy.

The witness Graber testified that he lived on the road to Camp Dodge; that he knew the appellant and had known him about a year; that some time in the latter part of March, but the exact date he was unable to state, the appellant came to his house one morning, about the middle of the forenoon, and knocked at the door, and the witness recognized him; that appellant asked him if he had any objection to his going down in the woods, and told him that a couple of soldiers wanted to go down in the timber. At that time the automobile was standing in the road in front of the house and the witness told the appellant that it would be all right for them to go to the woods. He also testified that a few days after the appellant had been to the house he was down to the timber with his wife one Sunday, and she found a slip of paper in the timber and a place where some paper had been burned.

Mrs. Graber was also a witness, and testified to the fact that on a day in March a man came to the door of their house, some time in the forenoon, and she heard him talking with her husband, and that shortly after the robbery she found a piece of paper and observed a pile of burnt paper in the woods on the farm.

The appellant was a witness in his own behalf, and denied that he had anything whatever to do with the robbery, and offered testimony explaining his whereabouts on the day of the robbery.

Upon this record, we are asked to hold that there was not sufficient evidence to corroborate the testimony of the two accomplices to justify the jury in returning a verdict of guilty against the appellant. We are not prepared to so hold. This evidence, offered in corroboration of the accomplices, went much farther than to merely show the commission of the offense or the circumstances surrounding it. It went directly to the question of connecting the appellant with the commission of the offense. The corroborative testimony may be circumstantial in its character, and it is not necessary that there shall be corroboration of all of the circumstances testified to by the accomplices.

In *State* v. *Dorsey*, 154 Iowa 298, 134 N. W. 946, we said:

"It is not necessary that the corroboration be of every material

fact. If it be such as to satisfy the jury that the witness spoke the truth in some material part of his testimony in which he is confirmed by unimpeachable evidence, this is sufficient if it leads to the conclusion that he also spoke the truth as to other matters for which there was no corroboration. State v. Allen, 57 Iowa, 431; State v. Hennessy, 55 Iowa, 299; State v. Feurehaken, 96 Iowa, 299; State v. Hall, 97 Iowa, 400.

"And, as a rule, if there be any corroborating testimony, the sufficiency thereof is for a jury. See cases just cited and State v. Miller, 65 Iowa, 60; State v. Dietz, 67 Iowa, 220; State v. Van Winkle, 80 Iowa, 15.

"Again, the corroborating testimony may be circumstantial. In other words, it need not be direct. Whether direct or circumstantial, if it corroborates the testimony of the accomplice in any material part and tends to connect the defendant with the offense, it is sufficient. State v. Schlagel, 19 Iowa, 169; State v. Stanley, 48 Iowa, 221; State v. Miller, supra."

The corroborative testimony in the instant case was sufficient to carry the question to the jury, and it was for it to determine its weight, credibility, and sufficiency to establish the guilt of the appellant.

II. It is also urged that the evidence in the case as a whole was insufficient to justify a conviction of the appellant, and that we should reverse for this reason. It is strenuously argued that the two accomplices changed a portion of their testimony in regard to material matters during the trial, and that they were not entitled to belief for this reason, and that upon the whole case the evidence is insufficient to sustain a conviction.

We have set out enough to indicate the general character of the evidence. We have examined the record with care, and we are satisfied that there was sufficient evidence to justify the verdict of the jury, or, in other words, the case is not so lacking in evidence in behalf of the state as to warrant interference by this court.

We find no error in the record, and the judgment appealed from must be affirmed.

STATE *v.* McGLOTHLEN

Supreme Court of Iowa, 1881. 56 Iowa 544, 9 N. W. 893.

The defendant appealed from a conviction in a bastardy proceeding.

SEEVERS, J. Counsel for defendant insists there was no evidence tending to show the guilt of the defendant except that of Amanda

Meeker, the prosecutrix, and this being so the conviction cannot be sustained. The statute provides in cases of this character "the issue on the trial shall be guilty or not guilty, and shall be tried as an ordinary action." Code, §4720. An ordinary action is defined to be a civil action at law as distinguished from an equitable proceeding (Code, §2507), and in such actions no corroboration of a witness, however much he may be interested in the result, is required to enable a party to recover.

It is further provided by statute that the defendant in prosecutions for "a rape or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried female of previously chaste character, cannot be convicted upon the testimony of the person injured unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense." Code, §4560. Nor can a conviction be had upon the uncorroborated evidence of an accomplice. Code, §4559. As it is provided by statute that corroboration is required in other cases and none in this, therefore, because of the statute, we hold a defendant may be convicted in a proceeding of this character upon the uncorroborated evidence of the prosecutrix.

II. The court refused to instruct the jury that they must be satisfied beyond a reasonable doubt the defendant was guilty before they could convict. This is said to be erroneous and *Barton* v. *Thompson,* 46 Iowa, 30, is relied on. This case has been overruled. *Welch* v. *Jugenheimer,* ante, 11. This case must be tried as an ordinary action in civil cases; the rule as to reasonable doubts prevailing in criminal cases does not apply, and there may be a conviction upon a preponderance of the evidence.

Affirmed.

SECTION VII
CONFESSIONS

STATE *v.* STORMS

Supreme Court of Iowa, 1901. 113 Iowa 385, 85 N. W. 610.

The defendant appealed from a judgment of conviction of the crime of murder.

DEEMER, J. The conviction was secured largely on alleged confessions made by defendant to the chief of police of the city of Burlington, at which place the crime was committed; and to the county attorney of Des Moines county. It is strenuously insisted

that the court erred in admitting these confessions in evidence, for that the same were not free and voluntary, but were extorted by coercion, torture, threats, and promises. The facts relied upon to establish the voluntary character of the confession are, in substance, as follows: The crime is said to have been committed on Sunday evening, January 23, 1898. Defendant was at that time 28 years of age, and had had considerable business and other experience. He was arrested Saturday, January 29th, at about 3 o'clock in the afternoon, and taken to the police station. There he was placed in a cell about 6x8 feet, which was devoid of furniture, and had nothing for a bed except two boards nailed together and supported at either end by cleats. Here he was kept until the alleged confession was made, some time about half past 4 o'clock the following Monday morning. About 10 o'clock Saturday evening he was taken to the office of the chief of police, and there examined by the mayor and other officers of the city regarding his whereabouts on the Sunday and Monday previous. The chief of police was absent from the city, and did not return until about 11:30 on Saturday evening. On his return he went immediately to his office, where defendant and others were. He (the chief) soon learned that defendant and some five others were arrested for the crime, and was told regarding the examination of the defendant by the mayor and others. During the night, Greiner, the chief of police, had all the suspects before him from time to time, and he examined and cross-examined the defendant regarding his whereabouts before, at the time of, and after the crime is said to have been committed. At the first or second examination defendant was thoroughly searched, and his undershirt was taken from him and kept for use as evidence. A pocket-knife was also taken from him, as we understand it, but this was not done until he made his confession. Sunday forenoon the defendant was again brought into the presence of the chief of police, and again catechised regarding his whereabouts at different times at and about the time the crime is said to have been committed. As we understand it, he was brought before the chief of police twice Sunday morning, and about the same questions asked each time. Defendant was slow about answering, sometimes delaying for more than 15 minutes. Sunday afternoon defendant was again brought before the chief of police, and, after going through much the same process, the chief, about 4:30 o'clock in the evening, took the defendant to the morgue where the dead bodies of the victims of the murder were lying. He was handcuffed when he left the office, and so remained until he was returned to the jail. With

the chief of police and defendant were two of the city aldermen. The morgue was about three blocks from the jail, and the bodies of the murdered women were lying in the second story of the building, which was used as a morgue. Defendant was taken past the bodies which were lying close to him, and no doubt all present closely scrutinized his manner and demeanor at the time. After the return from the morgue defendant was again taken to the chief's office, and kept there until about dark, when he was returned to his cell. As he was being conducted to his cell, he asked the chief to step to one side, and said he wanted to talk with him. He (the chief) responded that he had been talking with him "a whole lot," "and you are contradicting yourself, and if you will talk to me right I will talk to you." About 11 o'clock Sunday evening defendant was again taken before the chief of police, and remained in his room until 4:30 or 5 o'clock Monday morning. Shortly after coming before the chief the last time he asked him (the chief) why it would not be just as well to plead guilty or "say he was guilty." The chief said: "No; that they wanted to know if anyone else was implicated in the crime." Very much talk was indulged in from that time until the confession is said to have been made, very little of which is material, save that defendant asked to see an attorney, and said that if the attorney advised him to tell about the crime he would do it. The chief said the attorney would be there Monday morning to see him. The attorney had been there on Sunday, as we understand it, but was not allowed to have any private conversation with him (the defendant). He did tell the defendant, however, that he (the attorney) had been employed to look after his (defendant's) interests. During the Sunday night interview the chief showed the defendant some old revolvers and other relics that he had in his office. Shortly after making the remark regarding his attorneys, defendant grew sullen, and refused to talk. The chief thereupon got up to go out of the room, and defendant [called] him back. In a short time the defendant made a confession regarding his connection with the affair, and gave all the details thereof. The chief cross-examined him while the confession was being made, and at its conclusion sent for Mr. Clark, the county attorney. The county attorney came as soon as he could after being called, and when he came the defendant was informed that he was the county attorney, and for him to make his statement, that it might be taken in writing. Defendant gave an account of his whereabouts on the Sunday the crime is said to have been committed, but did not fully state all the matters he had related to the

chief of police, and Mr. Clark arose, put on his overcoat, and started to leave, when defendant said, "Hold on; I will tell you all about it." Shortly thereafter he made a full confession to Clark, which was taken down in writing, sworn to by defendant, and witnessed by two witnesses. It is this confession, as well as the oral one made to the chief of police, which is claimed was involuntarily made. The written confession was read over to defendant at least twice, and Clark asked him several times before he made it if it was his free and voluntary act, and if any promises or inducements were held out to him to induce him to make it; to which he responded there were no inducements, and that it was his free and voluntary act. Something was said about defendant's attorney, and he was informed that his attorney would be there in the morning. There is a conflict in the evidence regarding defendant's condition the next morning, and, in view of this conflict, we cannot say there was anything in his after appearance indicating that the confession was involuntary.

Such in brief, is the testimony relating to the confession. The trial court heard it at first, the jury being excluded, and, finding that the confessions were *prima facie* admissible, directed the jury to be recalled, and all the evidence relating to the confession was read in its presence.

The question of law presented, and the only one for our consideration, relates to the admission of these confessions in evidence. It is evident there were no promises or other inducements held out to defendant to elicit a confession. His statements, oral and written, if not voluntary, were brought about through fear or torture, and it is with that question we have to deal. Confessions which are not voluntarily made, but are extorted through hope or fear caused by inducements held out to the prisoner, are not competent evidence against him. Whether confessions proposed to be introduced in evidence against a prisoner are of the character just indicated is a question to be determined by the court. *State* v. *Fidment,* 35 Iowa, 541. But where there is a conflict of evidence, and the court is left in doubt on the question, the inquiry should be left to the jury, with the direction to disregard and reject the confession, if, upon the whole evidence, they are satisfied that the confession was obtained through improper influences. *Com.* v. *Cuffee,* 108 Mass. 285; *People* v. *Howes,* 81 Mich. 396, 45 N. W. Rep., 961; *Burdge* v. *State,* 53 Ohio St. 512 (42 N. E. Rep., 594). Where the confession appears on its face to be free and voluntary, as the one made by the defendant in this case, the burden is on the defendant

to show that it is incompetent. *Rufer* v. *State,* 25 Ohio St. 464. In the absence of such a showing, the weight of authority seems to be that, when there is a general objection that the confession was made under promises, threats, or fear, the burden is on the state to show that it was freely and voluntarily made. *Bradford* v. *State,* 104 Ala. 68 (16 South. Rep., 107); *People* v. *Rodriguez,* 10 Cal. 50. Adjuration to tell the truth is not sufficient to justify the rejection of the confession. *Sparf* v. *U. S.,* 156 U. S. 51 (15 Sup. Ct. Rep., 273, 39 L. Ed. 343); *Com.* v. *Preece,* 140 Mass. 276 (5 N. E. Rep., 494); *King* v. *State,* 40 Ala. 314. The fact that the confession was induced by artifice, deception, or fraud will not exclude. *People* v. *Barker,* 60 Mich. 279 (27 N. W. Rep. 539); *State* v. *Staley,* 14 Minn. 105 (Gil. 75); *Heldt* v. *State,* 20 Neb. 492 (30 N. W. Rep., 626). Fear of ultimate consequences of the crime will not be sufficient. *Allen* v. *State,* 12 Ill. App. 190; *People* v. *Wentz,* 37 N. Y. 304. And the mere fact that the prisoner is in custody will not amount to undue influence or fear. *State* v. *McLaughlin,* 44 Iowa, 82; *Com.* v. *Preece, supra.* That the prisoner was manacled had no bearing. *Hopt* v. *People,* 110 U. S. 574 (4 Sup. Ct. Rep., 202, 28 L. Ed. 262). In *People* v. *Johnson,* 2 Wheeler, Cr. Cas. 261, it was held no valid objection that defendant had been called upon to touch the deceased's body. But if the confession is obtained by any sort of threats or violence, or by any direct or implied promises, however slight, or by the exertion of any improper influence, it is inadmissible. Inquisitorial proceedings, which directly or indirectly, menace the life or safety of the prisoner, and are calculated to produce such a state of mind as that the answers given to the questions propounded are not free and voluntary, will not be tolerated. But the showing must be such as to induce the belief that the statements were the result of an involuntary condition of mind. As said by Fuller, C. J., in *Wilson* v. *U. S.,* 162 U. S. 613 (16 Sup. Ct. Rep., 895, 40 L. Ed. 1090): "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any kind." The fact that the confession was made to a public officer while the accused was under arrest, in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment may be taken into account in determining whether or not the statement of the prisoner was voluntary. *Hopt* v. *People, supra.*

We have already said that the confession in this case is presumed to have been voluntary, and that the defendant was called on to

introduce enough evidence to rebut this presumption. It was the province of the judge to determine, as a preliminary question, whether the confessions were made with that degree of freedom to justify their admission in evidence, or, in case of doubt and of a conflict in the evidence, to submit the question to the jury, under proper instructions, and unless there was manifest error in admitting them in evidence, this court will not interfere. *Fife* v. *Com.* 29 Pa. St. 429. The matter rests peculiarly in the sound discretion of the trial judge, and, while his decision is subject to review, this court will not reverse on a question of fact, unless the finding is manifestly against the weight of the evidence. The trial court saw and heard the witnesses, and had better knowledge of the facts than we can possibly have; hence its conclusion will not be disturbed, unless clearly and manifestly erroneous. *State* v. *Staley,* 14 Minn. 110 (Gil. 75); *Bartley* v. *People,* 156 Ill. 228 (40 N. E. Rep. 831); *Com.* v. *Preece, supra; State* v. *Gorham,* 67 Vt. 367 (31 Atl. Rep. 845); *Fife* v. *Com.,* 29 Pa. St. 429; *People* v. *Wentz,* 37 N. Y. 305.

Now, in the case at bar no threats were made, and no promises or inducements held out. The fear, if any, under which defendant labored, arose from other causes than the conduct of the officers having him in charge. He was searched, his clothing removed, and his undershirt kept by the chief of police, but this was not unusual or extraordinary. He was handcuffed, and taken in the presence of the dead bodies of the victims, but this would not produce fear in and a confession from an innocent man. When returned to the jail, he said to the chief of police that he wished to talk with him, and he was returned to the chief's office pursuant to this request. He was told by counsel that he had been employed to look after his interests, and, while counsel was not allowed to talk with him privately on Sunday afternoon, defendant was told that he could see him Monday morning, and at the time the written confession was made was again informed of that fact. He made no request to see counsel after being informed of these facts. When brought before the chief of police, Sunday evening, pursuant to his own request, he was not "browbeaten" or unduly questioned by that officer. The talk was general, and the firearms shown him were relics that were explained, and their history given. He was in no way threatened therewith. Much of the time while before the chief on Sunday evening defendant was smoking. He was questioned regarding his whereabouts, and, when he asked about pleading guilty, the chief said, "No; he wanted to know who else was with him." When the confession was made, there was no questioning. The prisoner gave

a connected account of the entire transaction. When the county attorney came, he asked the defendant if his confession had been freely made, and if any inducements had been offered, and defendant said, "No". When the county attorney started to leave during a break in the confession, the prisoner called him back, and said, "I will tell you what I know." After making the written confession, he asked the county attorney if he could not make him some kind of a promise, and the county attorney said, "No." While making his confession, the defendant was not apparently excited, but sat smoking a cigar most of the time. He was advised by a fellow prisoner that the best way out was to plead guilty, and trust to the mercy of the court. The material parts of the confessions correspond with the proven facts, and, as defendant was not informed by any one as to what the evidence against him was, this should be regarded as a strong circumstance tending to show the truth of the statement, and that it was not manufactured out of fear, or by reason of the inquisitorial character of the proceedings.

In view of this record, and of the evidence on which the trial court acted in admitting the confessions, we are not prepared to hold that it abused its discretion, or that the confessions were obtained in such a manner as that they should be excluded. All of the evidence was submitted to the jury under proper instructions, and the defendant had the benefit of the showing made. The case is not stronger in its facts than the following, where confessions were held voluntary: *Com.* v. *Cuffee,* 108 Mass. 287; *Com.* v. *Smith,* 119 Mass. 311; *Com.* v. *Preece, supra; Sparf* v. *U. S.,* 156 U. S. 52 (15 Sup. Ct. Rep. 273, 39 L. Ed. 243); *People* v. *Wentz, supra; Roesel* v. *State,* 62 N. J. Law. 227 (31 Atl. Rep. 408); *State* v. *Trusty,* 1 Penn. 319 (40 Atl. Rep. 766); *People* v. *Kennedy,* 159 N. Y. 346 (54 N. E. Rep. 51), which is a very strong case; *Com.* v. *Chance,* 174 Mass. 248 (54 N. E. Rep. 551). We will not take the space needed to quote from these cases in support of our holding. It is sufficient to say that they fully sustain the conclusion reached. In *Flagg* v. *People,* 40 Mich. 706, defendant was told by the officers having him in charge that the best thing he could do was to own up. Defendant in that case was weak-minded, and the officers also gave him some intoxicating liquor before he made his confession. In *State* v. *McCullum,* 18 Wash. 394 (51 Pac. Rep. 1044), defendant was placed in a dungeon and kept there for six days, and was taken out from time to time, and asked if he would confess. On his refusal to do so, he was returned. Finally he made the confession that was rejected. *Gallagher* v. *State,* 40 Tex. Cr. App. 296 (50

S. W. Rep. 388), also relied on by appellant, is based on a statute, and is easily distinguishable. *U. S.* v. *Bram*, 168 U. S. 532 (18 Sup. Ct. Rep. 183, 42 L. Ed. 568), is the strongest case cited by the appellant, and if the rule there announced were followed it would call for a reversal of this judgment. We do not regard the majority opinion as sound, and in this we are not alone. See *State* v. *Trusty* and *Roesel* v. *State*, *supra*, and Wigmore's notes to section 213, Greenleaf Evidence; also note 10 to section 219. Greenleaf Evidence. We prefer the dissenting opinion of Justice Brewer filed in that case. While there are other cases that would seem to call for a reversal of the judgment, the ones we have cited abundantly sustain our position, and seem to announce the more modern and more sensible rule. As said by Earl, J., in *Reg.* v. *Baldry*, 2 Dennison & P. Cr. Cas. 430: "In many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt." Courts have frequently gone to the extreme in their anxiety to protect the defendant's rights, unmindful of the fact that the peace and good order of society should also be protected. We do not think there was such an abuse of discretion in the trial court in admitting the confessions as to justify us in interfering.

Affirmed.

STATE *v.* JAY

Supreme Court of Iowa, 1902. 116 Iowa 264, 89 N. W. 1070.

The defendant appealed from a judgment of conviction of the crime of larceny.

LADD, C. J.—In the course of the trial, George Keenhold was called as witness, and testified that as special deputy sheriff he arrested the defendant, and, being asked what was said by the latter, was first cross-examined as to the competency of any statements made by counsel for the defendant, as follows: "Q. You told him if he would tell where she was it would go easier with him, did you? A. I might have told him it would be better for him. The mare he had taken had been traded, and he wanted to tell where she was. After I asked him some statements, he said he would tell where the mare was. Q. That is, you asked him questions, as the testimony here shows, of Mr. Garner, that if he would tell this it would be easier for him? A. Perhaps I told him something like that; yes. Q. Didn't you, Mr. Keenhold, in fact, tell him that before Garner came up? A. Yes, sir; perhaps I did. Q. And, when you told him it would go easier for him if he would tell about

it, then he told you before Garner came up about the horse? A. He told me; yes. He told me where he had traded the horse, and where he could probably find her." Direct examination continued: "When we were out at the well I told him I had a warrant for his arrest. He asked me what for, and I told him. I asked him where the horse was. He said he wanted to do what was right, and I told him it would be much easier for him before a court or jury." Over the objection of the defendant, the witness was allowed to testify that the accused then stated that he had taken the mare alleged to have been stolen from the pasture of its owner, and exchanged her with some horse traders on the way to Ames, and pointed out the horse in the road as one he had received, and that the mare traded would likely be found with said traders between Ames and Nevada.

It is insisted that this testimony of defendant's statements was incompetent, because these were induced by the promise or hope held out by Keenhold. It is elementary law that such statements must be entirely free and voluntary; that is, must not be extracted by any sort of threats or violence, nor any direct or implied promises however slight, in order to be admissible. It is not important to determine whether they amounted to a confession of guilt, or merely a declaration of facts tending to show guilt, for, as said in Greenleaf on Evidence, "the law excludes not only direct confessions, but any other declaration tending to implicate a prisoner in the crime charged even though in terms it is an accusation of another or a refusal to confess." The evidence leaves no doubt but that the officer before anything was said by Jay, assured him that it would go easier with him if he would tell where the mare, alleged to have been stolen, was, and we have only to determine whether this was sufficient inducement to justify the exclusion of the evidence. In 3 Russell Crimes (6th Ed.), page 478, it is said: "The law cannot measure the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." This rule is fully recognized in *State* v. *Storms,* 113 Iowa, 385, and *State* v. *Novak* 109 Iowa, 717. See, also, *Bram* v. *U. S.* 168 U. S. 532 (18 Sup. Ct. Rep. 183, 42 L. Ed. 568); *State* v. *Chambers* 39 Iowa, 179. What was said by the officer flattered the hope of the defendant, and was certainly in the nature of an inducement to speak. It was equivalent to saying that it would be better for him if he would disclose the locality of the mare alleged to have been stolen. Many decisions are referred to in Bram's case where statements made by the prisoner were held inadmissible because of the language set out.

Thus, in *Rex* v. *Griffin,* Russ. & R. 151, telling the prisoner that it would be better for him to confess; in *Reg.* v. *Garner,* 1 Den. Crown Cas. 329, saying, "It will be better for you to speak out;" in *People* v. *Barric,* 49 Cal. 342, saying to the accused, "It will be better for you to make a full disclosure;" in *Green* v. *State,* 88 Ga. 516 (15 S. E. Rep. 10, 30 Am. St. Rep. 167), saying, "Edmond, if you know anything, it may be best for you to tell it;" in *Biscoe* v. *State,* 67 Md. 6 (8 Atl. Rep. 571), saying, "It will be better for you to tell the truth and have no more trouble about it;" in *State* v. *Drake,* 113 N. C. 624 (18 S. E. Rep. 166), saying, "If you are guilty, I would advise you to make an honest confession; it might be easier for you; it is plain against you;" in *Vaughan* v. *Com.,* 17 Grat. 576, saying to the accused, "You had better tell all about it." See, also, cases collected in 6 Am. & Eng. Enc. Law, 530 *et seq.* Precisely, what words or conduct will constitute an inducement to make admissions is often difficult to determine. Much necessarily depends upon the surrounding circumstances, what had preceded the statement, and by whom made. Thus Parke, B., held in *Reg.* v. *Moore,* 2 Den. Crown Cas. 523, an admonition to a person suspected of a crime that "she had better speak the truth," did not vitiate a subsequent confession, because not made by one in authority, and in the course of the opinion observed that an important consideration was "whether the threat or inducement was such as to be likely to influence the prisoner," and that "if the threat or inducement was held out actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement." Here the suggestion that the condition of Jay might be alleviated was made by the officer having him in custody, immediately after the arrest. The situation was such as that it can hardly be conceived the words spoken to him could do otherwise than create in him the impression or belief that admissions of guilt would secure for him a benefit of some kind. Keenhold's testimony of statements made by defendant should have been rejected.

II. Within a few minutes Keenhold and defendant met George Garner, sheriff of Boone county, whom Keenhold informed what Jay had said. The latter, after inquiring of Garner if he would prosecute, and being told he was not the prosecuting witness, repeated what he had said to Keenhold. It seems that Garner did not suppose Keenhold was an officer, and thought he first arrested defendant. But as he was not present he could not have known what Keenhold did by way of making the arrest. Certainly what occurred emphasized, rather than refuted, the fact that accused in

what he said and did was influenced by what had previously transpired between him and Keenhold, and for this reason Garner's testimony of statements made to him should also have been rejected. *State* v. *Chambers,* 39 Iowa, 179.

III. The state suggests that because of prefixing his answers with "perhaps" it is doubtful whether Keenhold made the statement. The inference to be drawn from his testimony as a whole is that he did, and this appears to have been the view of the district court for the issue as to whether he did was not submitted to the jury. See *State* v. *Chambers, supra.* As other evidence will necessarily be adduced on another trial, the remaining errors assigned will not be likely to arise again.

Reversed.

STATE *v.* FORTNER

Supreme Court of Iowa, 1876. 43 Iowa 494.

The defendant appealed from a judgment of conviction of the crime of larceny.

ROTHROCK, J. The defendant was jointly indicted with one Sovereign, who, by reason of something in the nature of a confession, was released on his own recognizance. The defendant only was put upon trial, and the State introduced as a witness one August Hurlburt, who testified in substance as follows: "I had some wheat taken, and after defendant's arrest and while he was confined in jail I went to the jail and told him that Sovereign had turned State's evidence against him; that Sovereign was just as guilty as he was, and I wanted him to turn State's evidence against Sovereign; I told him if he took my wheat to own it up and I would clear him. He said he did not take my wheat, but that he and Sovereign took Myers' wheat."

This testimony was objected to by the defendant as not being his voluntary confession. The objection was overruled and defendant excepted, and now insists that this action of the court was error, to his prejudice. The mere fact that the defendant was confined in jail is not sufficient to exclude the confession, nor is the fact that witness stated to defendant that Sovereign had turned State's evidence against the defendant. Hurlburt was not seeking a confession as to the larceny of Myers' wheat but his own, and the only inducement made to defendant was to confess as to the stealing of Hurlburt's wheat. No promises were made to defendant to induce him to confess having stolen the wheat of Myers. In order to exclude the confession as involuntary, there must be some promises

or inducements made, or some injury threatened. "The material inquiry is, whether the confession has been obtained by the influence of hope or fear applied by a third person to the person's mind." 1st Greenleaf on Evidence, Sec. 219. We are of the opinion that there was no error in admitting this testimony.

II. Seven exceptions are taken to the instructions to the jury. On a careful examination we are satisfied that the instructions state the law correctly.

III. There was evidence attacking the general reputation of the witness Hurlburt for truth, and the circumstances relied on by the State to corroborate him are not of a very strong and persuasive character; and yet after the very full, clear and explicit instructions of the court below upon the questions of impeachment and corroboration, we are not prepared to say that the jury were not warranted in believing the testimony as to the defendant's confession.

Affirmed.

STATE *v.* BROWN

Supreme Court of Iowa, 1878. 48 Iowa 382.

From a judgment of conviction of the crime of embezzlement the defendant appealed.

ROTHROCK, CH. J. Bowman was the general agent of the Washington Life Insurance Company, of New York. As such agent he collected the annual premiums due from policy-holders, and made monthly remittances to the general office. The defendant was employed by Bowman as his clerk and book-keeper. All the business between the company and Bowman was done in the name of Bowman, and defendant had no connection with the company, excepting as the employe of Bowman.

About April 1, 1877, the defendant was taken sick, and called a physician, who prescribed for him. As the physician was about leaving, defendant told him that he had a confession to make; that he had been taking money from the office. The physician cautioned him to stop, but defendant insisted on stating that for three or four months before that he had been taking money which was collected from policy-holders. He asked the physician if he thought Bowman would put him in jail, and what he thought he had better do. The physician replied that Bowman was a just man, and would not go beyond justice with him, and that he had better send for him, which he did.

Bowman went to defendant's room, where defendant made a

voluntary confession to him, giving the particulars as to the manner in which he appropriated the money, and produced a pocket diary, and another small book showing the amount he had taken. These confessions were freely and voluntarily made on the defendant's own motion, without solicitation from any one. The books and accounts of the office showed that some one had been appropriating the premiums.

The defendant asked the court to instruct the jury as follows:

Confessions alleged to have been made by the prisoner in the presence of the prosecutor alone, or in the presence of the prosecutor and one or more of his select friends, are the weakest of all testimony deemed competent in law, and should be received and considered as such, and confessions made in the presence of any one witness alone are deemed in law as weak and unsatisfactory, unless corroborated by other testimony.

This instruction was refused, and the court instructed the jury in these words:

"When it is shown that a public offense has been committed, free and voluntary confessions of guilt, or of facts necessarily tending to show his guilt, by the party accused, are, by the law, presumed to be true, and are entitled to the highest credit and greatest weight of evidence of such fact or facts; but such confessions will not warrant a conviction, unless they are accompanied by other evidence that the crime has been committed."

We think the instruction asked by defendant was properly refused. A voluntary confession of crime is not the weakest of all testimony deemed competent in law. It is true, evidence of a confession should be examined with care; but when it is clearly established, whether made in the presence of the prosecutor or his friends, or to one person alone, if made voluntarily, it should not be regarded as weak and unsatisfactory.

The instruction given by the court upon this subject, when considered in the light of the facts of the case, was correct. The evidence, without conflict, showed a free and voluntary confession of the crime, with all its particulars. In such cases the confession is entitled to the highest credit and greatest weight as evidence. Wharton's American Criminal Law, 313; 1 Greenleaf on Evidence, §215.

II. There was evidence introduced which tended to show that, at the time the defendant confessed the crime, he was sick, his mental faculties were weakened, and he was agitated and disturbed in his mind.

An instruction was asked that the condition of the mind of defendant should be considered in estimating the weight to be given to the proof of the confessions.

This was refused, but the court, on its own motion, instructed that the mental condition of defendant should be considered, "solely for the purpose of determining whether he had sufficient mental power, capacity and control to know what he was at the time saying, and whether such statements were freely and voluntarily made by him, and whether they were true."

There was no error in this action of the court. The instruction asked and that given are in substance the same. Counsel for defendant urges that there was evidence that the defendant's mind was impaired at the time the alleged criminal acts were committed, and that the court should not have limited the jury to a consideration of the condition of mind at the time the confessions were made.

No instruction was asked based upon the thought that defendant was insane when he appropriated the money. If such instruction had been asked we think it would have been properly refused, for want of evidence to make it appropriate to the case.

III. The defendant asked that the jury be instructed that he be found not guilty, unless it was proven that he embezzled the money of Bowman. This was refused, but the court did instruct the jury that if the money belonged to the life insurance company, and Bowman had no interest therein, or any part of it, then the allegation that the money was the money of Bowman was not sustained by the proof.

There was no error in this. The court gave proper instruction as to what constituted ownership of the money, and the evidence fully warranted the jury in finding that it was the money of Bowman. Considering the relation of the defendant to Bowman, and the relation of the latter to the life insurance company, the jury could not have fairly found otherwise than they did as to the ownership of the money. The judgment must be

Affirmed.

STATE *v.* TOWNSEND

Supreme Court of Iowa, 1921. — Iowa —, 182 N. W. 392.

Having been convicted of murder the defendant appealed.

STEVENS, J. . . . .

II. Objection was lodged against the admission of the alleged confession in evidence upon the ground that it was obtained by threats and intimidation, and that it was not the free and volun-

tary statement of the accused. The confession was first made to Giellis, chief of police of the city of Dubuque. Giellis testified that he first talked with the defendant on August 17th at the matron's quarters, and that the defendant then said Crees had gone to Cincinnati. Another conversation was had with him on August 19th concerning the disappearance of Crees. After the defendant was taken to the police station on the 20th, the chief of police interrogated him at some length, and in the course of the conversation said to him:

"I told him that I intended to go into this matter to the bottom; that I would sift it out. There were many other members of the family who would be able to throw some light on this matter, I was sure, before I finished my investigation; and I would continue to investigate the case if I had to bring up the entire family and question each and every one of them separately. I was positive I would get the facts. He said: 'What are you driving at? What do you mean?' I said: 'You needn't ask that question of me. You known down in your heart what I mean. You know what you are up here for, and you know why I am questioning you. And you know that you have not told me the truth.' "

This is the language which counsel for the defendant construes as a threat. It was during this conversation that the defendant confessed, saying:

"Yes, I do know something about the death of Crees. I might as well come out with it."

Later the county attorney, in the presence of the chief of police and police matron, wrote the statement which was signed by the defendant. This statement recites that it "is voluntary, without threats, promise, or inducement of any kind." Both the chief of police and police matron testified that this statement was read over to him; that he signed the same freely and without anything being done by any of the parties present to induce him to do so.

The court submitted the question to the jury by instructions to which no exception was taken. The chief of police testified that he used no persuasion, promises, or other inducements to obtain the confession. The court could not have found, as a matter of law, that the confession was improperly obtained, and this question was therefore properly submitted to the jury. *State* v. *Bennett,* 143 Iowa, 214, 121 N. W. 1021. The confession was properly received in evidence.

. . . . . .

Affirmed.

STATE *v.* MORAN

Supreme Court of Iowa, 1906. 131 Iowa 645, 109 N. W. 187.

Having been convicted of larceny, the defendant appealed.

WEAVER, J. . . . .

Nor was there any error in permitting the witness to say that, after talking with the defendant, he went to the place indicated by him and found the stolen horses. In the first place, the mere giving of the information where the stolen property might be found was not in itself evidence of his guilt of the larceny—much less was it a confession of guilt. Moreover, it is a well-established rule that, even where a confession is not in itself admissible in evidence against the accused, yet if, in consequence of such revelation, other material facts are discovered tending to establish guilt, then such facts, and so much of the confession as distinctly relates thereto, are admissible. 1 Wigmore's Evidence, sections 856–859; *Lowe* v. *State*, 88 Ala. 8 (7 South. 97); *State* v. *Height*, 117 Iowa, 650.

. . . . . .

Affirmed.

SECTION VIII

THE DEFENDANT'S ADMISSIONS AND DECLARATIONS

STATE *v.* SCHAUNHURST

Supreme Court of Iowa, 1872. 34 Iowa 547.

From a conviction of incest the defendant appealed.

BECK, CH. J. . . . .

IV. The court instructed the jury that the identity of the accused and the persons named in the marriage record could be established by admissions, identity of names, and by the absence of evidence showing that other persons of the same name did the acts of which defendants stand charged. This instruction is also objected to and we are of the opinion that it is likewise correct. We know of no other manner of identifying parties named in a record, than that pointed out in the instruction. Evidence of identity, of any other character, would amount to proof of the fact established by the record; certainly identity established in the manner indicated by the instruction is sufficient.

V. Counsel next complain that the court directed the jury to the effect that the relationship of the parties may be proved by their acts and declarations. The best answer to this objection is the instruction itself. It is in these words:

"The relationship of brother and sister may be proved by the acts and declarations of defendant himself.

"You should be careful in considering declarations and confessions, as they necessarily have to come to us second handed, but if they are established by many reliable witnesses, oft repeated, maintained for years without variation, surrounded and connected with acts which are convincing evidence of the truth of the declarations, they may then become the most convincing and satisfactory evidence.

"If, therefore, you find that the accused has raised up his children in the belief, and taught them to believe that the woman whom he married was his sister, that he has treated, designated and recognized the woman to her face as his sister, that he has introduced her into society, among his friends and relatives as his sister, has admitted since the marriage that she is his sister, then if you believe that his means of knowledge was such that he ought to know whether what he was stating was true or not, and that it would be unreasonable to believe otherwise, then you should find that his declarations were true, and find that they were actually brother and sister.

"If on the other hand you believe that there is any reasonable doubt about his declarations of the relation being made, or about their being true, or any reasonable doubt as to the relationship, or as to his knowledge of it, you should solve the doubt in his favor and acquit. Or, if you have any reasonable doubt of the marriage of the accused and his sister, you will also solve this in his favor."

Certainly the rules here announced are correct. The admissions and declarations here referred to are not in the nature of confessions contemplated by Revision, section 4806, upon which alone a prisoner cannot be convicted. They are competent to establish defendants' guilt under *State* v. *Sanders*, 30 Iowa, 582. In our judgment the instruction is not only correct, but could not have been so understood by the jury as to work prejudice to defendants.

. . . . . .

Affirmed.

STATE *v.* RICHMOND

Supreme Court of Iowa, 1908. 138 Iowa 494, 116 N. W. 609.

The defendant appealed from a judgment of conviction of the crime of statutory breaking and entering.

DEEMER, J. The state claims that defendant broke and entered the freight house of the Chicago, Milwaukee & St. Paul Railroad

Company, at North Buena Vista in Clayton county, Iowa, and took therefrom some tobacco. In support of its claim it was permitted, over defendant's objections, to show that after the crime was committed defendant went to the station agent of the railway company, and, quoting from the record: "He says: 'You can settle this without letting the company know anything about it.' And I says: 'I would look damn pretty settling anything like that.' I wasn't put there for that business. 'Well,' he says, 'it don't amount to much.' I could go up to Sawyers, he could go up to Sawyers, and buy another butt of tobacco, or I could send away and get one. He would see that I would not be anything out by the deal. I told him: 'No, I couldn't do anything like that.' He says, or begged me to settle it. I says: 'I could not see anything that way.' There had been so much of that going on down there, there would have to be an example made of somebody, and I did not know but what he was as good material as any one else. Then he got kind of brave. He says: 'It wouldn't amount to anything anyhow. It would just be a petit case.' I says: 'I don't know anything about law, but,' I says, 'there was a stamp on those goods, and I don't know whether that makes any difference or not. The way I understand law I reckoned a stamp would be some offense.' He says: 'No, it wouldn't.' He was persisting two or three times to settle it. Then he walked away.''

I. Complaint is made of the ruling because it is said that the implied admissions of the defendant were made as an offer of compromise and were therefore inadmissible. Defendant was not offering to settle any civil liability, but evidently was trying to suborn the witness, or to compound a felony. Surely his admissions in so doing were admissible against him. The rule upon which counsel relies is not applicable to criminal cases. *State* v. *Soper,* 16 Me. 293 (33 Am. Dec. 665). The cases upon which reliance is placed are not in point. *State* v. *Lavin,* 80 Iowa, 555, was a civil suit, a bastardy proceeding. *State* v. *Nugent,* 134 Iowa, 237, was a criminal case, but the offer of compromise was of a civil suit for damages. *State* v. *Emerson,* 48 Iowa, 172, was a criminal case, but the offer of compromise was of a civil suit. In the case now before us no civil suit was pending, nor was one threatened. Indeed, there was no offer of compromise made by defendant for the purpose of settling his civil liability. The evidence was clearly admissible.

II. It is said there is no testimony tending to show a breaking and entering, and that defendant's crime, if any, was simple lar-

ceny, or larceny from a building without breaking. In this contention there is no merit. There is ample evidence to show that defendant rolled back a door to the freight house which was closed, and through the opening so made entered the depot and took the tobacco.

III. Lastly, it is argued that the sentence is excessive. We do not think so. It was for three years and nine months. The maximum in such cases is ten years. Defendant offered no excuse for his crime, and there are no palliating circumstances, save that he offered to replace the tobacco. This, of course, is no excuse or justification. No reason appears for interfering with the discretion of the trial court.

No error appears, and the judgment must be, and it is,

Affirmed.

STATE *v.* PRATT

Supreme Court of Iowa, 1866. 20 Iowa 267.

The defendant appealed from a judgment of conviction of larceny.

WRIGHT, J. . . . .

After the State had proved the loss of the money corresponding with that charged and its ~~value~~ (equivalent to the ~~denominations~~ of the several bills), the prisoner could not ask an acquittal upon the ground that there was no proof of the genuineness of said bills. There was no suggestion or proof, so far as shown by the record, tending to show that the bills were counterfeited. Their amount and value being shown, it will ~~not~~ be presumed that they were ~~not~~ genuine. Whart. Cr. L., 645.

It seems that there was testimony tending to show that the prisoner, when arrested, was charged with the theft and made no reply. To this proof there was no objection at the time; but an instruction was asked to the effect that such testimony "could not be used against him." This was refused, and very properly. The objection could not regularly nor properly be raised in this manner nor at this stage of the proceedings. Then, again, while this character of proof is often entitled to but little weight, there is no rule justifying its entire exclusion. Its value is to be determined by all the circumstances, of which the jury are the peculiar judges. One person may be so confused or embarrassed, so completely taken by surprise by the unexpected and sudden arrest and charge, as, though ever so innocent, to act in a manner strongly indicative of guilt. And yet, another man, cool and self-possessed, may be able

at once to command the entire situation, and though the most hardened villain, disarm suspicion and impress those around with his innocence. All these and other circumstances are to be considered. But the fact that he was charged and made no reply or denial, may properly be shown, the effect thereof being left to the jury. Wharton, 345, note 6; 1 Greenl. Ev., §215; *State* v. *Perkins*, 3 Hawks, 377; 10 Georgia 511.

. . . . . .

Affirmed.

STATE *v.* KLUTE

Supreme Court of Iowa, 1913. 160 Iowa 170, 140 N. W. 864.

From a conviction of murder the defendant appealed.

PRESTON, J. . . . .

VI. After defendant was arrested, he was taken to town by the sheriff in the sleigh with deceased. The sheriff testified that while in the sleigh, and while deceased was suffering, defendant said: "By Golly, by God, I fix him. Let me at him." To meet this, defendant sought to show statements by defendant to witness Marshall. At this point the record shows the following: "Q. During the time you were there, you may just tell what Mr. Klute said and did, if he said and did anything." This was objected to as immaterial, hearsay, and constituting a self-serving declaration of the defendant. The objection sustained. "Mr. Baker: If the court please, now I may be wrong in this matter, but I would like to suggest to you in the proper way, as to why I think this evidence ought to be admitted. Now there was evidence given by the sheriff here as to statements made by defendant on the way up in the sled. Court: The court will allow you to introduce any evidence you may have that contradicts those statements, but, so far as any independent statements are concerned, that would come under another rule. Mr. Baker: Well, if the court please, it is not for the purpose of denying or disputing those statements directly, but it is for the purpose of showing that at least he did not intend to do, and did not care to do, what the sheriff said that he stated he wanted to do on the way up in the sled." The objection sustained. The record does not show a specific offer, but it is evident that the purpose was to show statements by defendant in his own favor, and which were self-serving. It was shown fully what defendant did. The time referred to must have been a half hour or more after the shooting. The witness was a neighbor living a block or more away who had been summoned by defendant's son. He had

dressed and called another neighbor, which he says would take ten or fifteen minutes. He had telephoned for the police, and walked to defendant's house, where he sat, talking and visiting with defendant and his family. The evidence as to what defendant said was clearly incompetent.

. . . . . .

Affirmed.

SECTION IX

THE ADMISSIONS AND DECLARATIONS OF OTHERS

STATE *v.* LEHLAN

Supreme Court of Iowa, 1913. 158 Iowa 183, 139 N. W. 475.

The defendant appealed from a judgment of conviction of the crime of larceny from a building.

LADD, J.—I. The defendant and one Harry Borsky, alias Ike Polsky, were jointly indicted for the larceny of several bolts of silk from the store of Welsh-Cook Company in Cedar Rapids. The defendant elected to be tried separately, and argues that the court erred in receiving testimony of the acts and declarations of Borsky in promotion of an alleged conspiracy to steal silks from said store. The evidence tended to show that he and Borsky had registered under assumed names at the Grand Hotel September 18, 1911, and had occupied the same room until the afternoon of September 20th; that on September 19th at about 12:30 o'clock defendant went to the second floor of said store and stood at the silk counter for a few minutes examining the silk and looking about the room, observed a clerk leave for lunch, and talked with the one remaining, followed him to the blanket counter, and told him he would not wait longer for his uncle, and requested the clerk, if his uncle came, to say he would be back about 1:30 o'clock. He did not return, but on the next day Borsky and Robinson came at about the same time—that is, 12:30 o'clock—the former bringing from his room at the hotel a large satchel. This was set down at the top of the stairs, and they advised the manager who had followed them that the firm of Robinson & Cone was transferring a stock from Sioux City to Davenport and they would like to look at blankets. Borsky represented himself as Cone and started for the blanket department with the only clerk on that floor; the other having departed for lunch, as on the day previous. Robinson talked with the sales manager for a few minutes, when the latter returned to the first floor. After looking at blankets near by, Borsky asked to see the woolen blan-

kets, and the clerk took him to a distant part of the floor out of view of the silk counter, and there the latter examined the stock for ten or fifteen minutes. But he did not buy then, as his store was not ready. Requesting a list with prices and the clerk's name, he said he had not had dinner, and he would have to go, shook hands with the clerk several times, took his satchel, and departed down the elevator with Robinson. In the afternoon the clerk who had stepped out to lunch discovered that about fourteen bolts of silk were missing. On the afternoon of September 21st, at about 2:30 o'clock, Borsky called at the dry goods department of Rudge-Gunsel Company in Lincoln, Neb., and began negotiating for the sale of silks which he claimed to have received in a trade and later submitted samples of silks like those stolen. The buyer insisted upon seeing the goods. A deal was not made, but he saw Borsky and defendant together at the Lincoln Hotel the next morning. The defendant registered at the Savoy House at that place in the afternoon of the 22d and remained until the 25th, Borsky sharing his room, and on the later date they left and were seen thereafter entering the Star Rooming House, joining the hotel, two or three times. They were arrested at about 2 o'clock in the morning of September 27, 1911, and, upon searching room sixty-one of the Star Boarding House, the satchel Borsky had at the store in Cedar Rapids and several bolts of silk missed therefrom were found. A collar of size suitable for defendant was found in a hand bag in the room. From this evidence, the jury might well have inferred the existence of a scheme or plan between Borsky and defendant to commit the offense, and, this being so, the rulings by which testimony of the acts and declarations of Borsky in promotion thereof, was rightly admitted.

II. John Schmitt, after testifying that he was a police officer of Lincoln, Nebr., and that he was detailed to arrest defendant and locate the stolen silk, was asked to "state whether or not prior to that time (when they were arrested) you had heard Lehlan and Polsky were occupying room sixty-one at the Star Rooming House." An objection "as calling for hearsay, immaterial, leading, and suggestive," was overruled, and the witness answered, "Yes, sir," and proceeded to testify of having searched the room. A similar question was propounded to W. T. Deveresse, the Omaha detective who located the alleged culprits, and over a like objection he answered in the affirmative. Had other evidence of such occupancy of the designated room been conclusive, the admission of this testimony as explaining the occasion for searching the room might

not have been regarded as prejudicial; but no testimony was adduced tending to show that defendant or Borsky was ever in the room, save the finding in a grip of a collar which fitted defendant and the satchel previously seen in Borsky's possession. The room then could not properly have been assumed to have been in their occupancy, and this hearsay evidence might have and doubtless was given consideration by the jury in passing on this issue. The rulings were erroneous.

III. There was no error in refusing to instruct, as requested by defendant, that the jury could not "find defendant guilty on account of any act of his done after September 20, 1911," for the jury was told that, unless found guilty of the larceny of the silk committed by some one on that day, he should be acquitted. This sufficiently guarded against the possibility of conviction for receiving stolen goods.

IV. The seventh instruction given read: "It is a rule that the unexplained possession of property recently stolen is presumptive evidence that the person in whose possession it is so found stole it; and if you find in this case, beyond a reasonable doubt, that shortly after the theft of the property described in the indictment, if there was a theft of it, or any portion of it was found in the possession of the defendant in Lincoln, Neb., or in the room which he was, or had been, occupying by himself or with his codefendant, and such possession has not been satisfactorily explained, such possession would be presumptive evidence of the defendant's guilt. And such presumption is not discharged or overcome by the fact that other goods not identified as belonging to the Welch-Cook Company were found at the same time and place."

Though it might have been inferred that defendant was stopping at the Star Boarding House, there was no showing that he occupied room sixty-one when there. The mere fact that a sixteen-inch collar was found in a grip in that room and that defendant wore collars of that size was not alone sufficient to warrant such conclusion.

Another reason for disapproving this instruction is that it declares that the finding of the stolen property in the room occupied by himself and Borsky would afford presumptive evidence of guilt. This is not so unless the jury also found that the two were acting in concert, for the silks were found in the satchel identified as the one Borsky had had in the store. As these were in Borsky's recent possession, to render this binding on defendant as furnishing presumptive evidence of guilt against him, it must also have appeared

that he was acting in concert with Borsky. *People* v. *Niclosi,* 34 Pac. 824; *State* v. *Raymond,* 46 Conn. 345; *Porter* v. *People,* 31 Colo. 508 (74 Pac. 879); *States* v. *Phelps,* 91 Mo. 478 (4 S. W. 119); *State* v. *Wohlman,* 34 Mo. 482 (86 Am. Dec. 117).

The requirement of such a finding was omitted from the instruction, and the error in so doing is not obviated by the previous instruction, as contended. Again, the possession is said to be presumptive evidence unless explained. As no explanation was attempted, this may not have been prejudicial error. *Baldwin* v. *State,* 31 Tex. Cr. R. 589 (21 S. W. 679); 25 Cyc. 152. But it will be as well to instruct more fully on another trial. *State* v. *Bartlett,* 128 Iowa, 518; *State* v. *Kimes,* 152 Iowa 240.

The court did not caution the jury not to consider the evidence of acts and declarations of Borsky alone in determining whether there was a conspiracy between him and defendant. Whether this omission, in the absence of a request, was error, we need not now determine, but mention the matter that it may not be overlooked on another trial.

Reversed and Remanded.

STATE *v.* WESTFALL

Supreme Court of Iowa, 1878. 49 Iowa 328.

The defendant appealed from a judgment of conviction of the crime of murder.

Beck, J. . . . .

V. A witness was permitted to testify, against defendant's objection, to a conversation had with one of the Dillards on the way home from the fight. Acts and declarations of the father of defendant, who it will be remembered is jointly indicted with him, at times subsequent to the fight, were also admitted, against defendant's objections; and like declarations of another of the parties indicted with defendant, made long after the fight, were also received in evidence. This evidence tended to show the participation of the parties making the declarations in the commission of the crime. It was clearly incompetent. The Attorney General does not contend with great confidence that the evidence was admissible, but he insists that its admission did not work prejudice to defendant, for the reason that the other evidence, apart from this now under consideration, was amply sufficient to authorize the verdict. But his position is unsound. Without the illegal testimony the jury may not have found the verdict for the State; this testimony may have made the complement of proof which satisfied their

minds. In that case the defendant would have been convicted upon illegal evidence. This court cannot determine what quantity of evidence was lawfully sufficient to authorize the verdict.

The court below, in an instruction, directed the jury that the evidence we are now discussing should not be considered in order to determine whether defendant was concerned in the commission of the homicide for which he was indicted. But the court adds, in the same instruction, "evidence of this character has been admitted only as tending to show that a public offense was committed, and the character of that offense, and not for the purpose of connecting the defendant with its commission."

Under the rules of evidence declarations of other persons, jointly charged with an offense, made after the act, are not competent against one who participated in the crime. Such declarations are regarded as any other hearsay testimony. It is just as inadmissible for one purpose as another.

The instruction quoted directed the jury to consider the evidence for the purpose of determining the character of the offense. It will be readily seen that such evidence was prejudicial to defendant. Upon it the jury may have found the crime to have been of a higher grade than they otherwise would have considered it.

. . . . . .

Reversed.

STATE *v.* EMEIGH

Supreme Court of Iowa, 1864. 18 Iowa 122.

The defendant appealed from a judgment of conviction of the crime of assault with intent to commit murder.

II. The indictment was framed upon §4214 of the Revision. On the trial the defendant's counsel asked a witness, "Did Mary Eliza Disque, on the Sunday succeeding the Friday of the offense, make to you any declaration as to whether the defendant did or did not commit the offense charged?"

The State objected, objection sustained, and defendant excepted. The court ruled correctly. The *subsequent* declarations of the person injured are not admissible, either for or against the defendant as independent evidence. To have authorized the reception of the offered testimony, the proper basis should have been laid when the person injured was examined as a witness. If she had admitted in her testimony the making of the alleged declarations this would have been all the defendant could desire. If she had denied making them, and they were material, she could then have been contradicted.

In other words, such evidence as that which was offered was available to the defendant only as impeaching testimony; and because the requisite foundation had not been laid for its introduction on this ground and for this purpose, it was correctly overruled.

We perceive nothing further in the record requiring distinct notice, and the judgment below must be

Affirmed.

SECTION X

DYING DECLARATIONS

STATE *v.* NASH

Supreme Court of Iowa, 1858. 7 Iowa 347.

STOCKTON, J. . . . .

V. Other questions, important in the future determination of the cause, were decided by the District Court, and have been discussed in this court—and we now proceed to consider them. The defendants were tried separately; but as the questions raised on the separate trials are very nearly identical, they will be considered in the same opinion. We first consider those questions so far as they refer to the case of the defendant, Nash.

The fourth assignment of error, is upon the ruling of the court admitting certain declarations of Harrison, made in the presence of the accused, to be given in evidence to prove that Nash was the person who shot him. It is proved that Harrison was shot about ten o'clock at night, on Friday, the 2d of April, 1858. Nash and Redout were arrested soon afterwards.

The prosecution having given evidence as to the state of mind and physical condition of Harrison at the time, proposed to prove by L. W. Huston that the defendant, Nash, was taken by him, as a public officer, into the presence of Harrison, on Sunday night, about forty-eight hours after the injury was inflicted; and to prove further the statement of the deceased on that occasion, that the defendant was the person who shot him. This evidence was objected to by the defendant; the objection was overruled by the court, and the evidence permitted to go to the jury.

The State next introduced W. H. Leech, and proposed to prove by him that on Saturday evening, April 10th, between five and six o'clock, P. M., the deceased made certain statements tending to identify Nash as the person who shot him; Nash then being present before him. Objection was made to this testimony by the defend-

ant. The objection was overruled, and the evidence allowed to go to the jury.

The witness, Leech, then testified that on the day mentioned, he took the defendant, Nash, before Harrison, and told him it was very important to the accused that he should be positive, and asked him if he could recognize the man who shot him, if he was in the room. He said he thought he could. Several persons were then placed in front of him, among them the witness and Nash. Harrison looked at Nash very steadily for some minutes, and then said, pointing to him: "He is the man that shot me." The witness then asked him, if he had any doubts, repeating to him its importance to the accused; and asked him if he was certain Nash was the man. He said there was no doubt; but suggested to the witness to take Nash and put on him a black cloak. This was done; the room was darkened, and a candle lighted, and Nash was brought before him again. He took the candle in his hand, and directed the position in which Nash should be placed, and the adjustment of the cap upon his head. When this was done, he said, pointing his finger to Nash: "I recollect you now, distinctly; you look now just as you did the night you shot me." Nash said: "You are mistaken, sir." Harrison replied: "I am not mistaken—you know it, and you know that I know it. It was a mean, dirty, shabby trick. I know you to be the man. I would be the last man to accuse you, or any other man, under such circumstances." He then proposed that the accused should stand erect; and directed him to go through the motion, as if he was going to shoot him then. Nash did so, and repeated the motion, until the deceased expressed himself satisfied.

The testimony of these witnesses relates to occurrences and declarations of the deceased, at a time when Nash was present. All that was said or done in Nash's presence was proper to go to the jury, for the purpose of introducing and explaining the conduct of Nash; and this, irrespective of the fact that the deceased was then under the apprehension of death. 1 Starkie's Ev., 64; 1 Greenl. Ev., Sec. 156.

The effect to be given to the declarations of Harrison, made at the time, and whether the same were competent to prove the fact of the commission of the offense by the accused, is a different question, and will be considered by us in connection with the testimony offered to be given as the dying declarations of the deceased, as detailed by the witness, Day.

The prosecution offered to prove by Benjamin G. Day that Harrison, on the Saturday morning before the Tuesday on which he

died, made certain declarations, which were offered to be given in evidence as his dying declarations, in order to connect the defendant, Nash, with the shooting, from the effects of which he died. This testimony was objected to, as was that of the witnesses, Huston and Leech, but the objections were overruled, and the evidence was suffered to be given to the jury.

The first point made by defendant is, that the admission of the evidence of the dying declarations of Harrison violates that provision of the constitution which declares that "in all criminal prosecutions the accused shall have the right to be confronted with the witnesses against him." Constitution of U. S., amendments, article 6; Constitution of Iowa, article 1, section 10. We think the objection is not well taken. Such evidence is received, as being analagous to the cases in which hearsay evidence is admissible, as being part of the *res gestae*. Roscoe Crim. Ev., 23; *McLean* v. *The State*, 16 Alabama 672; *Nelson* v. *The State*, 7 Humph., 542. The point was made in Tennessee, where the bill of rights declared that in criminal cases the accused should have "the right to meet the witness face to face." It was held, that this provision was not violated by the admission of the dying declarations of one deceased. *Anthony* v. *The State*, 1 Meigs, 265. In Mississippi, the bill of rights declares, that "the accused shall be confronted with the witnesses against him." It was held in that State, that this provision did not abrogate the rule of the common law, under which evidence of dying declarations is admitted. *Woodsides* v. *The State*, 2 How., 665; 1 Greenleaf Ev., Sec. 156, note. The same point was ruled in North Carolina, where the bill of rights contained a similar provision. *State* v. *Tilghman*, 11 Iredell, 513. And, in Georgia, it was held that the admission of such testimony did not contravene the sixth article of the amendments to the constitution of the United States, which provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.[''] *Campbell* v. *The State*, 11 Ga. 353.

It is, in the second place, objected that no such facts were proved, as the law requires to be first shown, as the ground on which the evidence is to be admitted. The rule is well settled that dying declarations, to show the fact itself, and the person by whom the mortal injury was inflicted, can only be given in evidence where they are made under a sense of impending death. 1 Greenleaf Ev., Sec. 158; Roscoe Crim. Ev., 25; 2 Starkie Ev., 262; 2 Russell on Crimes, 684. It must appear that they were made by the person injured, in the full belief that he should not recover. *Dunn*

v. *The State,* 2 Pike, 229. He must be conscious of the peril of his situation, and believe that his death is impending. *Nelson* v. *The State,* 7 Humph., 542; *Montgomery* v. *The State,* 11 Ohio 424; *The State* v. *Cameron,* 2 Chand. (Wisconsin), 172; *Hill's Case,* 2 Grattan, 594. It must satisfactorily appear that, at the time of making them, the deceased was conscious of his danger, and had given up all hopes of recovery. *The People* v. *Green,* 2 Parker Cr., 11. It is not necessary to prove, by expressions of the deceased, that he is apprehensive of immediate death, if it appears that he does not expect to survive the injury. *Rex* v. *Bonner,* 6 C. & P., 386; *Darn* v. *The State,* 2 Pike, 229. Nor is it necessary that the person be in *articulo mortis,* if he be under an apprehension of impending death. *The State* v. *Tilghman,* 11 Iredell, 513.

We first inquire whether the declarations made by the deceased on Sunday, at the time that Nash was first brought before him, and about forty-eight hours after the infliction of the injury, were properly admitted to go before the jury as evidence, to show that Nash was the person who shot Harrison.

There was evidence to show that, at the time of the injury, Harrison thought he could not recover—that he thought he was shot through the heart, and would live but a short time. When the physicians were examining the wound he told them he thought it was of no use. He expressed to the Rev. Mr. Reffe, his spiritual advisor, his belief that he should not survive. The surgeons, however, on examining his wound, did not think that the ball had entered the cavity of the chest, and so told him. They thought the policy was to remove from his mind the impression that he could not recover. And although Harrison thought the physicians were trying to deceive him, and did not seem to believe them when they attempted to encourage him, yet Doctor Haynes thought they partially succeeded.

On Saturday, the next day after he was shot, Mr. Day heard him say that at one time he had had some hope; but that he then thought he should die. From this time until the evening of the Sunday when Nash was taken before him, and when the declarations given in evidence were made, it is not distinctly shown what was the state of mind of the deceased, as to his condition. There is nothing, in addition to the evidence referred to above, to show that on the Sunday evening when the declarations were made the deceased was not without some hope of recovery. It must, in some manner, be shown that the impression of impending death existed at the time the declarations were made.

The prosecution, we think, had not laid the necessary foundation to entitle the declarations of the deceased, made on Sunday evening, the fourth of April, to be given in evidence to the jury, as his dying declarations. Being made in the presence of Nash, they may be given in evidence to show what he said or did, when charged with the crime; or, to show any feeling or passion exhibited by him at the time. But it is not permitted to give the declarations to the jury as evidence that Nash was the person who shot the deceased, without first showing that, at the time they were made, Harrison was conscious of the peril of his situation, and believed that his death was impending. As to the declarations of the deceased, made to the witness, Leech, on Saturday, the 19th of April, when Nash was taken before him the second time, we think the court properly admitted them to be given to the jury as his dying declarations.

It is enough (says Mr. Greenleaf), if it satisfactorily appears in any mode, that the declarations were made under a sense of impending death; it may be proved by the express language of the declarant, or be inferred from his evident danger, or from the opinions of medical, or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. 1 Greenleaf Ev., section 158. It is shown that, on the morning of the day when the declarations were made, the medical gentlemen attending upon Harrison held a consultation as to his condition. Dr. Haynes, who had attended him from the first, says that after this consultation the deceased was without any hope of recovery. He was a member of the Roman Catholic church. On Friday, the 9th of April, the Rev. Mr. Reffe received his confession, and administered to him the last rites of his church—extreme unction. On the morning of the 10th, he spoke to Mr. Day concerning his business affairs—of the disposition of his property, and of the provision he wished made for his wife after his death. He returned his thanks to his friends for their kindness to him in his sickness, and took his final leave of them, and of his wife. These circumstances have been held sufficient to show that the party did not expect to survive the injury, and to authorize his declarations to be given in evidence.

The points made by the defense are, that at the time these declarations were made the evidence showed that the deceased entertained hopes of recovery; and that it did not show that they were made under an impression of almost immediate dissolution. Reliance is placed upon the fact that the attending physicians at no

time told Harrison that they thought he would die, or that they thought his case was hopeless. Upon his remark to Dr. Marsh, on the 7th or 8th of April, that he was "not entirely discouraged, but fearful"—upon his concurrence of opinion, expressed to Mr. Gray on the 4th or 5th of April, when told that great hopes were entertained of his recovery—upon the fact that the physicians, until the last two or three days, tried all they could to encourage him to believe that he would recover—and that Dr. Haynes says that he thought they partially succeeded, and that, three or four days after the injury, they seem to have inspired him with a little hope.

To this it may be replied, that whatever presumption might be raised from this testimony, if it stood alone, it cannot overcome the conclusion to be drawn from the other evidence, tending to show the impression of mind of deceased as to his condition, on the Saturday before he died, when Nash was brought into his presence by the witness Leech. Of the first importance, in connection with this testimony, we place the fact that the consultation of the physicians, as to the condition of the deceased, was held on the morning of this day, and that Dr. Haynes states that from the time of this consultation the deceased was without hope of recovery.

On the other point made, we remark, as before, that it is not necessary to be shown that, at the time the declarations are made, the deceased was under the apprehension of immediate dissolution, or that he should have been *in articulo mortis*. It is sufficient if he believes his death is impending and certain. The length of time that elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence. 1 Greenleaf Ev., section 158. Nor will a declaration, which is competent evidence when made, be rendered incompetent by a subsequent revival of strength in the dying person. *The State* v. *Tilghman,* 11 Iredell, 513; *Johnson* v. *The State,* 17 Ala. 618.

The only remaining question made, concerning the declarations of the deceased, relates to what was stated by him to the witness, Day, on the Saturday morning before his death. As it is shown that at this time the deceased had made his confession, and received extreme unction from the priest; as the declaration was made at a time when he was regulating his worldly affairs, and providing for his wife after his death; when he had taken leave of her and of her friends, expressing to them his gratitude for their kindness and attention to him during his sickness, and when he had evidently given up all hopes of recovery, we think the declarations were properly received in evidence.

VI. The sixth assignment of error is to the admission, by the court, of the evidence as to the appearance and conduct of Nash, when told by the witness, Kaiser, that the officers were inquiring for him. The witness stated that he called on Nash the next morning after Harrison was shot, and told him the police officers were inquiring for him. The counsel for the State asked the witness how Nash appeared at the time; to which he replied, he turned white, and then laughed. The admission of this testimony was objected to by the defendant, and the objection overruled.

We think there was no error in permitting the evidence to be given to the jury. The bodily or mental feelings of an individual, where material to be proved, may be shown by the usual expression of such feelings, made at the time in question, and are to be deemed original evidence. 1 Greenl. Ev., section 102.

. . . . . .

Reversed.

STATE *v.* ELLIOTT

Supreme Court of Iowa, 1877. 45 Iowa 486.

From a conviction of murder the defendant appealed.

DAY, CH. J.—I. Three persons called as jurors, Slaughter, Chance and Wright, were, upon their examination as to their qualifications as jurors, challenged for cause by the defendant. The challenge was overruled. The abstract shows that Slaughter and Chance were challenged peremptorily. The abstract does not show that Wright was so challenged, and it does not appear whether or not he served upon the jury, but the jury was accepted by the defendant without exhausting the peremptory challenges to which he was entitled. If, then, Wright was allowed to serve upon the jury, it was by the defendant's voluntary act. If the ruling of the court in overruling the challenges for cause was error, it was error without prejudice. If defendant had exhausted all his peremptory challenges a very different question would be presented. *State* v. *Davis,* 41 Iowa, 311.

II. No person was present at the time the wound was inflicted upon Bold, of which he subsequently died. The principal evidence against the defendant consists in the dying declarations of deceased. The State introduced T. J. Caldwell, a surgeon who was called to attend Bold. He testified as to his condition and his belief that his dissolution was approaching. He was then asked to state what Bold said in regard to who shot him, or who inflicted the wound on him. The defendant objected, and then offered to prove to the

court by competent testimony that at the time of making the declaration the deceased did not believe that he was about to die, but expected to recover from the wound; and the defendant asked the court to be permitted, at this stage of the proceeding, to introduce his evidence touching the matters made in his offer, for the purpose of testing the competency of the declarations of the deceased. The court refused to admit this testimony, and permitted the declarations of deceased to be introduced. In this action we think the court erred. It is the province of the court to determine the competency of the declaration offered. In Greenleaf on Evidence, section 160, it is said: "The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not that of the jury, to determine whether they are admissible." The cases uniformly hold that the competency of such testimony is to be determined by the judge, in view of all the surrounding and attendant circumstances. *McDaniel* v. *The State,* 8 Sm. & M. 401; *Hill* v. *The Commonwealth,* 2 Gratt., 594; *Commonwealth* v. *Williams,* 2 Ashm., 69; *Rex* v. *Spilsbury,* 7 C. & P., 187; *Rex* v. *Bonner,* 6 C. & P., 386; *Rex* v. *Hucks,* 1 Stark. Rep., 521.

The court does not discharge this duty by simply hearing the evidence produced upon the part of the State. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice. Roscoe's Criminal Evidence, p. 35. Before the judge decides the question of admissibility he hears all the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover. Phillips on Evidence, Cowen & Hill's notes, part 1, page 252. In the same volume it is said, page 253: "We see that competency is a question of fact for the court, as in other cases. They are to find upon it as the jury do upon the main case, taking into view all the circumstances calculated to prove and disprove that despair of life which shall be equivalent to a sworn obligation." And upon page 254, it is said: "Upon this question of fact no rule can be adopted which will reach every variety of detail. The court try the competency of the deceased as the jury do his credibility; and the decision in either case on a conflict of testimony must be

final." We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered by the defendant, before determining that the declarations were competent, and permitting them to go to the jury.

III. The defendant offered to prove, as affecting the admissibility of the declarations of deceased, that he was a materialist, and that he believed in no God or future conscious existence. The proposed proof was not competent for the purpose of affecting the admissibility of the dying declarations. If Bold had been alive he would have been a competent witness, although a disbeliever in God and a future state. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in this State. Code, §3636.

IV. The defendant, however, when he came to make out his defense, offered to prove the foregoing facts as affecting the credibility of the declarations of deceased, and the evidence was not admitted for this purpose. In this there was error. Under the common law persons insensible to the obligation of an oath from defect of religious sentiment and belief were incompetent to testify as witnesses. The very nature of an oath presupposes that the witness believes in the existence of an Omniscient Supreme Being, the rewarder of truth and avenger of falsehood. Atheists, therefore, and all infidels, that is, all those who profess no religion that can bind their consciences to speak truth, are at common law, rejected as incompetent to testify. 1 Greenleaf, Sec. 368. Our Code, section 3637, provides: "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." If Bold had been offered as a witness it is very clear that the proposed proof would have been competent for the purpose of affecting his credibility.

But dying declarations are open to direct contradiction in the same manner as any other part of the case for the prosecution, and the prisoner is at liberty to prove that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution, and that no reliance is to be placed on his dying declarations. Roscoe's Criminal Evidence, p. 35.

. . . . . .

Reversed.

STATE *v.* BALDWIN

Supreme Court of Iowa, 1890. 79 Iowa 714, 45 N. W. 297.

The defendant, having been convicted of murder, appealed.

GIVEN, J. . . . .

II. On the trial the court admitted, over defendant's objections,

testimony as to statements made by Mattie Rodabaugh, deceased, as her dying declarations. The grounds of defendant's objections were that it was not shown that deceased was conscious of her danger, and had given up all hopes of recovery at the time of making the statements; that she was not conscious and sane at the time; and that the statements are not declarations of admissible facts. "The rule is well settled that dying declarations, to show the fact itself and the person by whom the mortal injury was inflicted, can only be given in evidence when they are made under a sense of impending death. . . . . It must appear that they were made by the person injured in the full belief that he should not recover. . . . . It must satisfactorily appear that, at the time of making them, the deceased was conscious of his danger, and had given up all hopes of recovery. . . . . It is not necessary to prove by expressions of the deceased that he is apprehensive of immediate death, if it appears that he does not expect to survive the injury." *State* v. *Nash*, 7 Iowa, 378; 6 Amer. & Eng. Cyclop. Law, "Dying Declarations," and cases cited therein. The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not that of the jury, to determine whether they are admissible. The courts uniformly hold that the competency of such testimony is to be determined by the judge, in view of the surrounding and attending circumstances. *State* v. *Elliott*, 45 Iowa, 487. Deceased became ill at the house of Aaron Culbertson, in Fairfield, from where she was taken, July 2, to her father's house some miles distant. Dr. Pitt Norris, who was called to attend her, pronounced her beyond the hope of recovery. She continued to grow worse until the time of her death, July 8. On the day the doctor was called she expressed to him a fear of dying, and wanted to know if he could do anything for her, and he said her symptoms were just as bad as they could be, but that he would do everything he could for her. He says: "I do not know whether it cheered her up or not. I formed and expressed the opinion that she might die at any time, at the first and subsequent visits that day, and she heard me express it." On the day she was brought home, and repeatedly thereafter, she expressed to her father and others the belief that she was going to die, and on one or two occasions she expressed a desire to live. In view of her condition, what was said to her by her physician and others, and her own expressions, we think she was conscious of her danger, and had given up all hope of recovery from the time she was brought home.

III. Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under a solemn belief of impending death. They are restricted to the act of killing, and to the circumstances immediately attending it, and form a part of the *res gestae*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately connected with the declarant's death, they are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify. They must relate to facts, and not mere matters of opinion or belief. 6 Amer. & Eng. Cyclop. Law; *State* v. *Clemons*, 51 Iowa, 274. There is no question but that the declarations relied upon were spoken with reference to the defendant. They are as follows: "He is the cause of my death. Oh, those horrible instruments. Laws. is the cause of my death, he is my murderer. They abused me terribly." We infer from the record that one of the theories of the prosecution, and probably the only one, was that defendant had gotten the deceased with child, and that he attempted to produce an abortion upon her by the use of instruments or drugs, or that he procured some one else to do so, and that death resulted. We also understand one theory of the defense to be that the deceased produced or attempted to produce an abortion upon herself that caused her death. We have seen that the declarations are restricted to the act of killing, and to the circumstances immediately attending it, and that they must form a part of the *res gestae;* that when they relate to former and distinct transactions, and embrace facts or circumstances not immediately relating or connected with the declarant's death, they are inadmissible. These declarations did not necessarily refer to any attempt to produce an abortion. They are as plainly referable to the former relations of the parties. If it be true that the defendant had gotten the deceased with child, then her declarations were such as she might naturally make in her extremity, about her seducer, without intending to charge him with any more than seduction. The expression, "Oh, those horrible instruments," may indicate that instruments were used, but in no wise charges the defendant with having used them or aided in their use. We have seen that dying declarations must relate to facts, and not to mere expressions of opinion or belief. It has been held that where a person dying from a gun-shot declares that "A. shot me. A. killed me. A. is my murderer,"—would be admissible as the statement of a fact because of the circumstances. To say under such circumstances, "A. is my murderer," would not be an expres-

sion of opinion with respect to the degree of the homicide, but a statement of the fact that A. had inflicted the mortal wound. Not so, however, with these declarations. They cannot be considered as stating as a fact that defendant had anything to do with attempting to or producing an abortion. "The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly stated. As to dying declarations there can be no cross-examination. The condition of the declarant in his extremity is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible." *State* v. *Center,* 35 Vt. 378. Our conclusion is that the court erred in admitting these declarations, and that such ruling was prejudicial to the defendant. As for this reason the judgment of the district court must be reversed, we need not further notice the errors assigned, as those not considered will not arise in a retrial.

Reversed.

SECTION XI

OTHER OFFENSES

STATE *v.* BRADY

Supreme Court of Iowa, 1896. 100 Iowa 191, 67 N. W. 240, 62 A. S. R. 560, 36 L. R. A. 693.

The defendant appealed from a judgment of conviction of the crime of cheating by false pretenses.

DEEMER, J. . . . .

II. The court permitted the state to introduce in evidence all the claims filed with the auditor by the defendant, for transportation claimed to have been furnished by him to poor persons during the year 1893, and down to the twelfth day of January, 1894. It also permitted the state to introduce the records of the Chicago, Milwaukee & St. Paul Railroad, the Wabash Railroad; the Chicago, Burlington & Quincy Railroad, and the Chicago, Rock Island & Pacific Railroad, showing, or purporting to show, the ticket sales

in their respective offices at the city of Ottumwa during the year 1893. The admission of this evidence is complained of. It is said in argument that it is not competent for the state to give in evidence facts tending to prove other distinct offenses, for the purpose of raising an inference that the defendant has committed the crime in question; nor is it competent to show that he has a tendency to commit the offense with which he is charged. That such is the general rule, must be conceded. But to this rule there are at least two well defined exceptions, which are well stated by Justice Stephen, in his work on Evidence (articles 10–12), as follows: "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith in any of the ways specified in articles 3–10, both inclusive, is deemed not to be relevant to such fact, except in the cases specially excepted in this chapter. (11) *Acts Showing Intention, Good Faith, etc.* When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion, may be proved, if it shows the existence, on the occasion in question, of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely, on the occasion in question, to act in a similar manner. (12) *Facts Showing System.* When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." The first of these exceptions we have frequently recognized and applied to cases of this character. See *State* v. *Jamison,* 74 Iowa, 613 (38 N. W. Rep. 509); *State* v. *Walters,* 45 Iowa, 389; *State* v. *Saunders,* 68 Iowa, 370 (27 N. W. Rep. 455); *State* v. *Stice,* 88 Iowa, 27 (55 N. W. Rep. 17); *State* v. *Lewis,* 96 Iowa, 286 (65 N. W. Rep. 295); *State* v. *Kline,* 54 Iowa, 183 (6 N. W. Rep. 184). The evidence we have referred to is clearly admissible under the first of these exceptions stated above, for the purpose of showing the knowledge, intention, and bad faith of the defendant. It seems to us that the evidence was also admissible for the purpose of proving a systematic scheme or plan on the part of the defendant to cheat and defraud the county, thus negativing the idea that the presentation of the claim in question was accidental, or through oversight, or mistake. 1 Greenleaf, Ev. (15th Ed.),

section 53, note, and cases cited; *Commonwealth* v. *Robinson* (Mass.) (16 N. E. Rep. 452). The jury may well have found, from the evidence complained of, that the filing of the claim, and the receipt of the warrant charged in the indictment, was a part of a plan, or scheme, adopted by the defendant to cheat and rob the county. For this purpose, as well as for the purpose of establishing the defendant's knowledge of the falsity of the claim, the evidence was admissible.

. . . . . .

Affirmed.

STATE *v.* BROWMAN

Supreme Court of Iowa, 1921. — Iowa —, 182 N. W. 823.

The defendant appealed from a judgment of conviction of the crime of murder.

PRESTON, J. . . . .

The general rule is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for separate punishment, or as aiding the proofs that he is guilty of the crime charged, but there are exceptions to this rule, and evidence as to other offenses is competent to establish motive, intent, absence of mistake or accident, a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other, and is competent as bearing on the question of identity of the person charged with the commission of the crime on trial. These exceptions are illustrated and applied in the following, among other cases: *State* v. *Walters,* 45 Iowa, 389; *State* v. *Jamison,* 74 Iowa, 613, 38 N. W. 509; *State* v. *Desmond,* 109 Iowa, 72, 80 N. W. 214; *State* v. *Brady,* 100 Iowa, 195, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560; *State* v. *Saunders,* 68 Iowa, 370, 27 N. W. 455; *State* v. *Lewis,* 96 Iowa, 286, 65 N. W. 295.

. . . . . .

Affirmed.

STATE *v.* CONCORD

Supreme Court of Iowa, 1915. 172 Iowa 467, 154 N. W. 763.

The defendant appealed from a judgment of conviction of the crime of breaking and entering a dwelling house, while armed with a deadly weapon, with intent to commit larceny.

DEEMER, C. J. . . . .

III. Defendant was a witness in his own behalf, and the county attorney, in cross-examining him, made this record:

Q. "Have you ever been convicted of a felony?" A. "I plead guilty to a felony." Q. "What was the charge against you?" (Objected to as immaterial. Objections sustained and exception.) Q. "You plead guilty and were convicted of burglary, were you not?" A. "I was convicted of a felony." (Objected to as incompetent, irrelevant and immaterial. Objection sustained and exception.) Q. "You were convicted of the crime of burglary before?" (Objected to as incompetent, irrelevant and immaterial. Objection overruled and exception.) A. "I was convicted of a felony." Q. "Will the reporter read the question?" (Reporter read the question.) A. "Yes, sir."

The defendant being a witness on his own behalf, it was competent to show, as affecting his credibility, that he had previously been convicted of a felony. Code Sec. 4613. The same statute provides that no other proof is competent except the record thereof. We held, in *State* v. *Carter*, 121 Iowa 135, that practically similar inquiries of a witness were proper. The writer is disposed to think that, as applied to such facts as are here shown, the rule should not be adopted. Counsel, in propounding the question, was evidently not intending to use the answer for impeaching purposes, but to show that he (defendant) had theretofore been convicted of a like offense. It was not admissible for that purpose, and the majority of the court as now constituted are of the opinion that, as this was the manifest purpose of the inquiry, it was error to press the question to an answer. It is true that the court correctly instructed as to the purpose for which this testimony was admitted and as to how it should be considered by the jury; but the statute attempts to safeguard the defendant's rights in saying that, on cross-examination of a defendant in a criminal case, the state shall be strictly confined thereon to matters testified to in the examination in chief. Code Sec. 5485. Of course he is subject to impeachment as any other witness; but the state, in conducting the cross-examination, should be confined strictly to matters of impeachment and not, under cover thereof, be permitted to inject prejudicial matter.

. . . . . .

Reversed.

SECTION XII

EVIDENCE GIVEN IN A FORMER PROCEEDING

STATE *v.* BROWN

Supreme Court of Iowa, 1911. 152 Iowa 427, 132 N. W. 862.

The defendant appealed from a judgment of conviction of murder.

LADD, J. . . . .

II. At a former trial of this cause, one Valentine had testified that as sheriff of the county he had received the accused into custody, and at that time he wore the slippers mentioned. The state introduced evidence on this trial, showing that Valentine could not be served with a subpoena, and was at Hot Springs, Ark. Thereupon the official reporter was allowed to read the testimony of the witness, as given at the former trial, from his shorthand notes then taken and properly preserved. This was authorized by section 245-a, Code Supp., but it is contended that it was in violation of that portion of section 10, article 1, of the Constitution of Iowa, which accords to persons in all criminal prosecutions and cases involving the life or liberty of the individual the right to be "confronted with the witnesses against him." The current of authority is that the testimony of a witness who has since died, given in a preliminary hearing or in a former trial, may be given in evidence without violating this provision of the Constitution, and this court has so held. *State* v. *Fitzgerald,* 63 Iowa, 268; *State* v. *O'Brien,* 81 Iowa, 88; *State* v. *Kimes,* 152 Iowa, 240. The grounds on which courts reach this conclusion differ somewhat. Some argue that the construction is necessary to avoid the failure of justice, *Marler* v. *State,* 67 Ala. 55 (42 Am. Rep. 95), others that the constitutional provision is but declaratory of the common law, under which the practice was allowed, *State* v. *McO'Blenis,* 24 Mo. 402 (69 Am. Dec. 435), and still others that the requirement of the Constitution has been met by being confronted by the witness, having had an opportunity to cross-examine at the preliminary hearing or former trial.

Prof. Wigmore, after reviewing the history of the hearsay rule and of the right to cross-examine, concludes that: "Confrontation is, in its main aspect, merely another term for the test of cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination.

Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand as a minor means of judging of the value of his testimony. But this minor advantage is not regarded as essential, i. e., it may be dispensed with when it is not feasible." 2 Wigmore, Ev., section 1365. This secondary advantage may also include a certain subjective moral effect on the witness, and, as said by the author, "is to be insisted upon whenever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it can not be obtained, it need not be required. It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document or a preferred witness may be dispensed with in case of unavailability, so demeanor evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining inquiry is whether the demeanor evidence, to be obtained by the witness' production before the tribunal, is available."

In *Mattox* v. *U. S.*, 156 U. S. 237 (15 Sup. Ct. 337, 39 L. Ed. 409), Mr. Justice Brown, after reviewing the decisions of several of the state courts, tersely summarizes the reasons for so construing the constitutional provision as not to exclude the testimony of a witness since deceased:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying the accused should never lose the benefit of any of these safeguards, even by the death of the witness, and that, if notes of his testimony are to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by

the testimony of a certain witness, should go scot-free, simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed, in order that an incidental benefit may be preserved to the accused.

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice, when this case was here upon the first writ of error (146 U. S. 140, 152 (13 Sup. Ct. 50), 36 L. Ed. 917, 921), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be

deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that, not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes, and of the testimony of deceased witness, such as was produced in this case, is competent evidence of what he said.

It is obvious that this reasoning is quite as forceful and as applicable in a case where the witness is out of the state, and therefore beyond the reach of a subpoena. The state is quite as helpless in procuring his attendance as though he were dead or beyond the sea, and the defendant has had precisely the same advantages in the way of confrontation. This was conceded in *Cline* v. *State,* 36 Tex. Cr. R. 320 (36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850), since overruled by *Porch* v. *State,* 51 Tex. Cr. R. 7, 99 S. W. 1122, in which the entire doctrine was repudiated. In *State* v. *King,* 24 Utah 482 (68 Pac. 418, 91 Am. St. Rep. 808), the court in concluding said: "The death of the witness has always and as of course been considered as sufficient to allow the use of former testimony. The absence of the witness from the jurisdiction, out of reach of the court's process, ought also to be sufficient, and is so treated by the great majority of courts. Mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary. A few courts do not recognize at all this cause for nonproduction; a few deny it for criminal cases. Neither position is sound. Inability to find the witness is an equally sufficient reason for nonproduction by the better opinion, though there are contrary precedents. The sufficiency of the search is usually and properly left to the trial court's discretion." In *State* v. *Nelson,* 68 Kan. 566 (75 Pac. 505), the court, after reviewing the authorities, concluded that "the only reasoning that justly sustains the use of former testimony of a witness who has since died applies with equal force where the witness is out of the jurisdiction of the court, and so can not be produced." The tendency of all the more recent decisions is in the same direction. *State* v. *Heffernan,* 22 S. D. 513 (118 N. W. 1027, 25 L. R. A. (N. S.) 868), and valuable note; *Knight* v. *State,* 103 Ala. 48 (16 South. 7); *State* v. *Stewart,* 34 La. Ann. 1037; *People* v. *Elliott,* 172 N. Y. 146 (64 N. E. 837, 60 L. R. A. 318); *Sneed* v. *State,* 47 Ark. 180 (1 S. W. 68). See, *contra, Pittman* v.

State, 92 Ga. 480 (17 S. E. 856); *State* v. *Houser*, 26 Mo. 431; *Hall* v. *State*, 6 Baxt. (Tenn.) 522; *Finn* v. *Commonwealth*, 5 Rand. (Va.) 701. We are of the opinion that there was no error in permitting the testimony of Valentine at the former trial to be read to the jury.

. . . . . .

Affirmed.

WEAVER, J., dissenting.

SECTION XIII

CHARACTER

STATE *v.* THOMPSON

Supreme Court of Iowa, 1905. 127 Iowa 440, 103 N. W. 377.

From a conviction of assault with intent to commit manslaughter, the defendant appealed.

LADD, J. . . . .

The father of Pearl Jones was a witness for the State, and, as a part of its evidence in chief, was permitted, over objection, to testify that the defendant had never been occupied, that he knew of, save as night clerk at a hotel for a couple of weeks; that he had gone to school very little; that he spent his time "bumming around town"; that he gave him no encouragement to visit Pearl; that he had ordered him out of his house, and had heard his wife do the same; that he had sent Pearl to Cedar Rapids on the 4th of February previous to get her out of defendant's company. All of this should have been excluded. The State is never permitted to assail the character of a defendant directly until he has placed it in issue. *State* v. *Rainsbarger*, 71 Iowa, 746. And even then this is not to be done by proof of particular instances of misconduct, but by evidence of his general reputation or actual character with respect to the trait involved. *State* v. *Sterrett*, 71 Iowa, 386; *Gordon* v. *State*, 3 Iowa, 410; *State* v. *McGee*, 81 Iowa, 17.

In this connection, the error in receiving the testimony of the sheriff of Story county, in rebuttal, that defendant for the two years past had been about town every night until from eleven to three o'clock, and that he associated with loafers, should be noticed. It was not in response to anything proven by defendant, and should have been excluded.

Reversed.

STATE *v.* NELSON

Supreme Court of Iowa, 1882. 58 Iowa 208, 12 N. W. 253.

Having been convicted of maintaining a nuisance, the defendant appealed.

DAY, J. . . . .

II. The only witness introduced in chief, on the part of the State, was James Spencer. For the purpose of impeaching the witness, the defendant introduced a number of witnesses, who testified that the general moral character of James Spencer, in the neighborhood where he lives, is bad. To sustain the character of the witness the State introduced one J. C. Painter, who testified that he had known the witness about five years, and never heard anything worse of him than drinking. Upon cross-examination Painter testified that Spencer had been in his employ for two or three years, and had handled thousands of dollars for him. When called upon to name some person he had heard speak well of Spencer, the witness said: "I don't know that I ever heard any person speak good or bad of him." The court thereupon said: "When a man has lived for five years in the neighborhood of a man, and been in his employ for two or three years, and mixed with the same people, and the witness who is on the stand never heard that man's character or honor called in question, that is the best kind of evidence that he is a man of good moral character, for the reason that we have but few trumpeters for what good we do in this world, but we have many trumpeters for the evil we do. It is generally like rolling snow, the farther it goes the larger it gets." The defendant objected to this statement for the reason that the jury are the judges of the testimony.

The State also introduced one D. B. Gottschall, who testified that he was somewhat acquainted with James Spencer, and knew him for two years in Jasper county, but did not know his general moral character in that county before he came to Polk county. The court thereupon said: "You can ask him whether, during all that time, he ever heard his character called in question. I do not decide that that is conclusive proof, but it is good proof tending to show a man's good character. If you have associated and done business with the same people, and never heard his character called in question, you may take it as good evidence tending to establish his character. It is the strongest kind of evidence in that direction." The defendant excepted to this statement of the court. The State then asked the following question: "You may state whether, while you knew Mr. Spencer in Jasper county, you ever

heard anything against his reputation or character." To this the witness answered: "I did not." Respecting this evidence the court instructed the jury as follows:

"When there has been testimony introduced for the purpose of showing that a witness who has testified in a case has a bad moral character and a bad reputation for truth, and witnesses are introduced to rebut such testimony, and they testify that they have lived in the same neighborhood with the witness for four, five, or six years, and show that they have mixed, done business and associated with the same people that the witness has lived among for five or six years, and then testify in substance that they never heard anything against the witness' moral character, and that they have never heard his reputation for truth called in question, that is among the best of evidence tending to show that the witness has a good reputation in both of said respects, and such testimony is entitled to just such weight and credit, and just such weight and credit only, as you may think it entitled to."

To this instruction the defendant excepted. The defendant assigns as error the several actions of the court above objected to. It must be competent for one, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character. Otherwise, the person, who has so far lived a blameless life as to provoke but little discussion respecting his character, would oftentimes be utterly unable to support his character when assailed.

We are inclined to think, however, that the court was not strictly correct in characterizing this evidence as the best evidence of reputation. It cannot be fairly said that proof that one's neighbors have never heard his character canvassed, is better proof of his good reputation, than proof that his neighbors generally speak in terms of commendation of his character. All that can properly be said of the kind of negative proof under consideration is, that it is competent proof of good reputation and should be accepted and weighed by the jury. Still, taking the whole action of the court together, we are unable to see how the defendant could have been prejudiced by it. The statement during the trial that the evidence proposed was the best evidence, and the direction to the jury that it was amongst the best evidence, was the statement of a mere abstraction, having no practical bearing upon the ultimate decision, so long as the court left to the jury the question of the weight and effect of the evidence, and directed them that it was entitled to such

weight and credit, and such weight and credit only, as they might think it entitled to.

. . . . . .

Affirmed.

SECTION XIV

ALIBI

STATE *v.* LINDSAY

Supreme Court of Iowa, 1911. 152 Iowa 403, 132 N. W. 857.

The defendant appealed from a judgment of conviction of the crime of rape.

EVANS, J.—The defendant was charged with the crime of rape committed on November 8, 1908, upon the person of Grace Hopkins, a child eight years of age. The facts and circumstances immediately preceding the alleged rape are not greatly in dispute. On the date in question the defendant was living at Prairie City. Prior to October 20, 1908, he had lived at Colfax, and was manager of the telephone company. On Sunday, November 8, he rode from Prairie City to Mitchellville, and from Mitchellville to Colfax in a single-seated, high-wheeled Holsman automobile. While at Colfax he took four children in succession for short rides in his automobile. The first was a boy. The second was the "little Hainey girl." This little girl was sister to a young man who roomed at defendant's house. While taking the Hainey girl riding, he was accosted by Ruth Stofer and Grace Hopkins, the prosecutrix. They asked him to take them also for a ride. This he promised to do, and this he did do a short time later, after the "little Hainey girl" had finished her ride. The last-named two girls were aged eleven and eight, respectively, and were engaged in play at the Stofer home. The defendant was acquainted with Ruth Stofer, but not with the prosecutrix. Upon returning, he first took Ruth Stofer for a ride of a mile or more, and brought her back to the starting place. He then took Grace Hopkins, the prosecutrix. Her story is that he took her to a field where "there were some trees," and ravished her, and left her to walk home from the field. She does not know where the field was. She has never been able to identify the place, although considerable effort was made in that direction with the assistance of friends and relatives. The lapse of time was concededly brief, and the place must have been nearby. The defendant's story is that he took the prosecutrix a short ride of a mile or more, and that he returned to a point within four blocks from the

place where he took her up, where he encountered an obstructed street, that she alighted at that point, and that he went on to Prairie City. He denies that he had stopped anywhere else with the prosecutrix, and denies all improper conduct. On both trips with the little girls he met different persons upon the road. He also met persons after he had started alone on his trip to Prairie City. Several of these were witnesses for the state. All witnesses who attempted to fix the hour of the day fixed it as between five and six p. m. According to the story of the prosecutrix, the first persons she saw after the defendant left her were Mr. Van Billard and Mrs. Marquis. Mrs. Marquis fixed that time as 5:30 p. m.

I. The trial court gave to the jury the following instructions on the subject of alibi:

(20) The defendant claims as a defense what is known in the law as an alibi; that is, that at the time of the commission of the alleged offense with which he is charged he was at a different place, so that he could not have participated in its commission. The burden of proof is upon the defendant to prove this defense by a preponderance of the evidence; that is, by greater or superior evidence. The defense of alibi to be entitled to consideration must be such as to show that at the very time of the commission of the crime charged, if one was committed, the accused was at another place and so far away, and under such circumstances that he could not by any ordinary exertion have been at the place where the crime is alleged to have been committed so as to have participated in the commission thereof. If he has so established such defense, he is entitled to an acquittal.

(21) While the burden of proof is upon the defendant as to the alibi, you are further instructed that if the evidence as to the alibi, with all the evidence in the case, raises in your minds a reasonable doubt as to his guilt, you should acquit.

(22) You are further instructed in reference to the law as to alibi that it is recognized in the law that the defense of alibi is one easily manufactured, and juries are generally and properly advised by the courts to scan the proofs of an alibi with care and caution. It is a legitimate and perfect defense if established.

Appellant complains of these instructions as having no basis in the record. We think this contention must be sustained. The only evidence pointed out to us by counsel for the state in support of these instructions is the evidence of a witness for the defendant who fixed the time of defendant's return to Prairie City at five minutes before six. The prosecutrix testified that when she saw

Mrs. Marquis it had been fifteen minutes or less since the defendant left her. The exact distance from Colfax to Prairie City does not appear, but it is a nearby town in the same county, and there is no claim made on either side that the distance could not have been traversed within a half an hour. We find nothing either in the defendant's testimony or in that of the witnesses in his behalf which can be said to present the defense of alibi. On the contrary, the testimony of the defendant himself was that he did take the little girl riding at or about the time she says he did. He does not claim that it was physically impossible for him to have perpetrated the crime because of distance separating him from the prosecutrix. He concedes his presence with the little girl at or near the time of the alleged crime, but he denies that he perpetrated any crime upon her. We think that the instructions upon this subject placed him and his defense in a false light before the jury. The findings of the jury would necessarily be adverse to such an alleged defense. There was no testimony on either side from which an alibi could be found in the sense in which that term is used in criminal cases, and in which it was defined by the court. We think, therefore, that the learned trial court erred at this point, and that the error was manifestly prejudicial.

II. Some other questions are presented for our consideration upon which we are not agreed. They may not arise upon another trial in the form in which they appear in this record.

For the error pointed out, a new trial must be ordered. Upon the record as a whole, we are not averse to such result.

Reversed.

McClain, J. (dissenting).—The conclusion reached by the majority that the lower court erred in giving an instruction as to alibi seems to me to be without justification on the record, and, as the reversal is made to depend entirely on this conclusion, I am compelled to refer somewhat in detail to the record, not only to indicate my dissatisfaction with the particular result, but also to protest against what seems to me to be an erroneous construction of the so-called defense of alibi.

Incidentally, it may be proper to suggest that the complaint made in appellant's assignment of error and brief is not that the court gave instructions on the subject of alibi, but that it "erred in giving the twentieth instruction," which was the first instruction relating to alibi, and that it was "error to characterize the defendant's defense herein as an alibi." These are the only references in the brief and argument to the subject, and, as the record

presents the evidence in a very abbreviated form, it is fair to conclude that only so much of the evidence is presented as is necessary to enable the court to pass upon the errors assigned and argued. There is no contention in the assignment or argument that the verdict was not sufficiently supported by the evidence, and there was no occasion therefore to present the evidence in full, even in a condensed narrative form. The defendant pleaded not guilty, and, of course, under that plea, any evidence tending to show that the crime charged was not committed by any one, or that the defendant was not the person who committed it, was competent, and, as tending to raise a reasonable doubt with reference to defendant's having committed the crime if one was committed, he was entitled without other pleading to introduce evidence that at the time and place when, as it appears, the crime, if any, must have been committed he was elsewhere. It is only in a very loose and colloquial sense that such evidence can be spoken of as tending to establish a defense in a criminal case. *State* v. *Reed,* 62 Iowa, 40. It goes like any other evidence for the defendant to the question whether the defendant was guilty of the crime charged, and, if it tends to raise a reasonable doubt of guilt, it should be considered by the jury. In the case before us the court told the jury that defendant had entered a plea of not guilty "which denies and puts in issue every material allegation of the indictment." He then introduced the instructions relating to alibi with this sentence: "The defendant claims as a defense what is known in the law as an alibi; that is, that at the time of the commission of the alleged offense with which he is charged he was at a different place, so that he could not have participated in its commission." It is to be noticed that the court did not by any fair inference exclude from the consideration of the jury the question as to whether a crime had been committed nor the question as to whether defendant was identified as the person who committed it. I can not see, therefore, any foundation for the claim on the part of the appellant that the court characterized defendant's defense as an alibi. It seems to me the same objection might be made in any case where the court gives specific instructions as to alibi as constituting a defense. It is true that technically it is error to refer to evidence tending to establish an alibi as though it were introduced to support a specific defense. But this practice has been so long acquiesced in here and elsewhere that it would be absurd to now treat such language as constituting reversible error. This court has so far recognized alibi as a specific defense as to hold that the burden of proof rests upon the defend-

ant to establish such defense by the preponderance of the evidence, although it is also necessary to tell the jury that evidence tending to establish an alibi must be considered with all the other evidence in the case in determining whether the defendant has been shown to be guilty beyond a reasonable doubt. *State* v. *McGarry*, 111 Iowa, 709; *State* v. *Hogan*, 115 Iowa, 455; *State* v. *Thomas*, 135 Iowa, 717. In *State* v. *Worthen*, 124 Iowa, 408, an instruction was approved which referred to alibi as "one of the defenses interposed by the defendant." I can not see how it could have constituted prejudicial error to refer to alibi as "a defense" rather than "one of the defenses." The jury could not have understood from the instructions taken as a whole that they were to consider no other evidence tending to show that defendant was not guilty than that tending to prove that he was elsewhere when the crime was committed. As the record shows, the testimony of defendant's witnesses tended to rebut the evidence for the prosecution that any crime whatever was committed. It also tended very materially to rebut the testimony of the witnesses for the prosecution that defendant was the person who committed the crime, if one was committed. The only direct evidence identifying the defendant as the person who committed the crime was that of the prosecuting witness herself, who fixed the crime upon the man who took her riding in an automobile, and who by other evidence was shown to have been the defendant, and, as the prosecution contends, the evidence of a witness to whom the prosecutrix made declarations very soon after the crime was according to her testimony committed upon her, which declarations also referred to the man who took her riding in the automobile. The court is equally divided as to whether this testimony as to declarations constituted independent corroborating evidence. On that question nothing need now be said. Even if this testimony as to declarations was admissible as *res gestae* for any purpose, it tended only, so far as the identity of defendant was concerned, to show that the crime was committed by the man in the automobile. Now, defendant testified explicitly that during the entire trip on which he took the prosecutrix for a ride he was not out of his automobile, and his automobile was not off the highway, while the prosecutrix testified that the man who committed the crime lifted her over the fence, took her some distance through a field, and there ravished her. There was testimony as to tracks corresponding to the tracks which would have been made by the shoes of the prosecutrix and the tracks of a man apparently accompanying her leading to and from a ravine some distance

from the highway in which there was a clump of willows. If the crime was not committed at some considerable distance from the highway and across a fence and at a point separated from the highway and the fence by a field, then the jury could hardly have believed that the defendant committed the crime, even though the other testimony in the case showed the prosecutrix to have been ravished about that time. For the purpose of breaking down her testimony as to defendant's connection with the offense, the prosecutrix was cross-examined at length in the effort to make it appear at least doubtful whether it was not some other man than the defendant who put her over the fence and took her into the field and accomplished her ravishment. There was also an effort by cross-examination to show that the identity of the defendant as the perpetrator of the crime was suggested to the prosecutrix immediately upon complaint being made to members of her family. Now, it is in my judgment absurd to say that, in view of this evidence and the other instructions of the court which are not the subject of any complaint, the jury could have thought that there was no question for them to determine save the sufficiency of the evidence tending to establish an alibi to raise a reasonable doubt of defendant's guilt.

In my opinion the very fact testified to by defendant that he was not out of his automobile in the highway during the time when the crime testified to by prosecutrix was committed raised a question of alibi. The distance of the defendant from the place of the commission of the crime at the time it appears to have been committed need not be shown to have been such as to render the commission of the crime by defendant impossible, in order that it may be considered as tending to support the so-called defense of alibi. It is sufficient for that purpose if it tends to preclude the possibility of the commission of the crime by the defendant and to raise a reasonable doubt as to whether he was present at the very time and place of the commission of the crime, provided, of course, his actual and immediate presence was under the circumstances essential to his having committed the crime charged. *Wisdom* v. *People,* 11 Colo. 170 (17 Pac. 519); *Peyton* v. *State,* 54 Neb. 188 (74 N. W. 597); 1 Bishop, New Crim. Proc., section 1061 *et seq.* I am quite ready to agree, however, that if the testimony of the defendant was the only evidence tending to show that he was not at the place of the commission of the crime, in view of the fact that he remained during his entire connection with the prosecutrix in his automobile on the highway, there would have been no occasion,

at least in the absence of a request by defendant, to give an instruction on the subject of alibi; for, as this testimony was as directly pertinent to the identity of the defendant as the person who committed the crime, it would have been useless to refer specifically to alibi, and would have perhaps been prejudicial to do so in view of the fact that the court gave the usual and authorized instruction to scan proofs of alibi with care and caution.

But this was not the only testimony relating to an alibi, nor is there anything in the record to indicate that the jury could have construed what the court said relating to alibi as applicable to this portion of defendant's testimony. At least two witnesses who gave material testimony for the prosecution said that on the evening in question they saw prosecutrix in the automobile with defendant on the highway a few minutes before six o'clock, and the evidence completely rebuts any thought that she was in the automobile after the commission of the crime. On the other hand, at least two witnesses for the defendant testified positively and circumstantially that defendant had returned to his home in Prairie City from five to fifteen minutes before six. In view of the fact that the prosecutrix herself fixed no specific time in the evening for the commission of the crime other than to say that it was about dark, and that the other witnesses for the prosecution, aside from the two above referred to, were quite indefinite as to the time when the circumstances testified to by them tending to connect the defendant with the crime occurred, I think that the jury may very well have considered the evidence for defendant as to the exact time when he was seen at his home in Prairie City as tending to raise a reasonable doubt of his commission of the crime, and therefore as tending to establish an alibi. Such evidence for the defendant could have had no other purpose, and could have been admissible for no other purpose, than as establishing an alibi. The court would have failed in its duty to instruct as to all the elements of the case if it had failed to give instructions with reference to evidence tending to establish an alibi. 1 Bishop, New Crim. Proc., section 980. If there was evidence tending to establish an alibi, then the instructions on that subject are conceded to have been without error.

I am unable, therefore, to agree to the reversal of the case.

DEEMER, J., joins in this dissent.

SECTION XV

ADMISSIONS BY THE DEFENDANT TO EXCLUDE EVIDENCE BY THE STATE

STATE *v.* KAPPEN

Supreme Court of Iowa, 1920. — Iowa —, 180 N. W. 307.

The defendant appealed from a judgment of conviction of the crime of having burglar's tools in possession with intent to commit the crime of burglary.

EVANS, J. . . . .

The alleged burglarious intent of the defendant might have been established by circumstances, and a wide range was open to the state for that purpose. It was open to the state to prove that the defendant had been guilty of recent burglaries. In proof of such burglaries it had a right to show that the articles produced in court had been found in his possession, and that they were the fruits of recent burglaries. The state offered "to show by the articles here in the courtroom that the defendant has been guilty of a great many different crimes of burglary." If by the aid of such evidence it were proved that the defendant had been guilty of recent burglaries, there could be no question of the sufficiency of the evidence to justify a conviction.

But the trial court accepted the tendered admission of the defendant as covering that ground, and excluded the evidence in advance by sustaining the defendant's motion. The argument upon the sufficiency of the evidence is based upon the insufficiency of such admission to cover the ground of the guilty intention. The record discloses that the defendant's admission was patterned upon our holding in *State* v. *Strum*, 184 Iowa, 1165, 169 N. W. 373. Counsel for defendant made the admission of record, and presented his motion to exclude the articles, with our opinion in the Strum Case before him. The ruling of the trial court was in strict obedience to our holding in that case. There is no material distinction to be found as between the record in the case at bar and the record in the Strum Case. The Strum Case was a prosecution for the crime of receiving stolen goods, knowing the same to have been stolen. For the purpose of showing knowledge, the state introduced evidence of other transactions involving the purchase by the defendant Strum of other stolen property. For the purpose of preventing the introduction of that line of evidence, counsel for the defendant in that case had entered of record the following admission:

"Comes now the defendant in open court, in the presence of the court and jury, and states that whatever act he did with which he is charged he did it designedly; that it was not accidental or unintentional or through inadvertence; and that whatever he did he did knowingly."

Because of such admission the defendant Strum objected to all evidence of other transactions offered for the purpose of showing knowledge and intent. Such evidence was, however, received by the lower court over such objections. On appeal by the defendant we held here that such admission was effective to preclude any further evidence on the question of knowledge and intent. We held expressly that the ruling of the court amounted to a "forcing of testimony into the record which has no right to be there, except to show that the defendant did act intentionally after he has solemnly admitted of record that this is so." Because of the admission of such evidence after the foregoing admission had been made we reversed the case. Precisely the same kind of an admission was entered of record in the case at bar, and it was entered for the same purpose as was that in the Strum Case.

Acting in obedience to our holding in the Strum Case, the trial judge sustained the defendant's motion and excluded the proposed evidence, and treated the proffered admission of the defendant as fully covering the purpose for which such proposed evidence was offered. No other course was possible to the trial judge, unless he had chosen to ignore our holding in such prior case. It is now urged that there is no proof that the proffered articles were stolen. How could there be such proof when the state was precluded by the ruling of the court from offering any evidence at all of other transactions for the purpose of proving intent? It is also urged that it was not proved that the articles were found in this dwelling. It was not essential that they should have been found in the dwelling. In order to put them in evidence, it would have been necessary for the state to show that they were the fruits of recent burglaries, and to connect the defendant with the possession somewhere. But the defendant anticipated all such evidence, and proceeded by a motion in advance to exclude all evidence pertaining to other crimes. We are not unmindful of the novelty of such practice. But it was exactly the course which we sustained in the Strum Case, whereby we left the trial court without any latitude or discretion. It is proper criticism to say that the admission was an indefinite one and a hypothetical one and was open doubtless to a varying construction. It did not admit the "act charged in the

indictment." But it did admit the intent in the event that the act charged were proved. The only act charged against the defendant as distinguished from his intent was that he had in his possession burglarious tools. If we are correct in our holding in the preceding paragraph that the possession of the tools was sufficiently proved, then the intent charged was confessed by the admission in the record. The admission thus offered declared its purpose to prevent other evidence of guilty knowledge being introduced by the state and the defendant entered his objection to such evidence by motion in advance. Though the state had been able to prove the discovery in the possession of the defendant of the fruits of a score of burglaries, it could not, under our holding in the Strum Case, introduce a line of evidence on the subject. The defendant through his counsel availed himself of the privilege held out to him by our pronouncement in the Strum Case, and he must take the consequences of a consistent application of the rule there announced. The defendant having made a broad hypothetical admission pursuant to the Strum Case for the purpose of limiting the field of evidence on the part of the state, and for the purpose of preventing the state from introducing evidence of other transactions as tending to prove knowledge and intent, such admission should fairly be construed as admitting all that such evidence would tend to prove. Where it is incumbent upon the state to prove an intent, evidence of other similar or related transactions is the most common form of such proof. We reversed the Strum Case because evidence of intent was introduced, notwithstanding defendant's hypothetical admission. If we should reverse this case on the ground that the state failed to introduce such evidence, we should put upon the state the doom of a perpetual predicament in its prosecutions. Such predicament would be not unlike that of Lincoln's ox, impaled upon a fence, "unable to gore in front or to kick behind."

Inasmuch, therefore, as the admission of the defendant was conclusive upon the state and precluded the state from introducing any evidence pertaining to the articles which it produced in court, and that such was the very purpose of the admission, it follows that such admission was necessarily conclusive upon the defendant also, and precludes him from saying that his admission was less effective than the evidence would have been.

VII. We deem it proper to say that we do not wish to be understood as reaffirming or approving our holding in the Strum Case, 184 Iowa, 1165, 169 N. W. 373, and in the Vance Case, 119 Iowa, 685, 94 N. W. 204, preceding it, in so far as the same requires the

state in its prosecution to accept the hypothetical admission of a defendant in lieu of evidence otherwise admissible. The majority of the court are not satisfied as to the soundness of such holding, and are disposed to take this occasion to so declare. No admission should be deemed to control the sound discretion of the court to permit evidence otherwise admissible. Much less should a hypothetical admission have such effect. The effect of our holding in the cited cases was to permit the defendant in effect to control the state's method of proof by basing admission upon a mere hypothesis, and without committing himself to a direct confession of guilt. Such holding did not, of course, impinge upon any right of the defendant herein, but gave to him an enlarged right of which he availed himself. In expressing our disapproval of our former holding, we take nothing away from the defendant herein. He received the full benefit of our pronouncement in the Strum Case, and we only hold him now to his own admission in the form in which he chose to make it.

It is our conclusion that the course adopted by the trial court was precisely that which was selected by the defendant through his counsel, and he has no just ground of complaint.

The judgment below is therefore affirmed.

SALINGER, J., dissented.

CHAPTER XIII

OTHER PROCEEDINGS PRIOR TO THE VERDICT

SECTION I

OBJECTIONS AND EXCEPTIONS

An objection is a declaration that the party objecting considers the particular matter or thing under consideration improper or illegal, the purpose of an objection being to refer the question of its propriety or legality to the court. An exception is a "formal objection to the action of the court, during the trial of a cause, in refusing a request or over-ruling an objection; implying that the party excepting does not acquiesce in the decision of the court, but will seek to procure its reversal, and that he means to save the benefit of his request or objection in some future proceeding".[1]

[1] Black's Law Dictionary.

"The office of a bill of exceptions is to make the proceedings or evidence appear of record which would not otherwise so appear" (5416, C. C. 9503). "On the trial of an indictment, exceptions may be taken by the state or by the defendant to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror;
2. In admitting or rejecting witnesses or evidence on the trial of any challenge;
3. In admitting or rejecting witnesses or evidence;
4. In deciding any matter of law, not purely discretionary on the trial of the issue.

Exceptions may also be taken to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on the trial" (5415, C. C. 9505. See 5418–5421, C. C. 9506–9509).

STATE *v.* POTTER

Supreme Court of Iowa, 1870. 28 Iowa 554.

The defendant appealed from a judgment of conviction of the crime of conspiracy.

BECK, J. . . . .

We are of the opinion that the offense of conspiracy is not sufficiently set out in the indictment.

These views being decisive of the case, other objections, raised upon the record, need not be considered.

It is urged by the attorney-general, that, as the defendant made no objections to the indictment in the court below, he cannot now for the first time raise them in this court. The rule relied upon in support of this position is not applicable to criminal cases, and does not obtain except in civil proceedings. We are required by the statute to examine the whole record, and, without regard to technical errors, to render such judgment as the law demands. Rev. §4925.

We could not, in a criminal case, affirm a judgment when it appears that the defendant is charged with no offense against the laws, though he should in no stage of the proceedings, either in this court or in the court below, object on that ground.

Reversed.

STATE *v.* SALING

Supreme Court of Iowa, 1916. 177 Iowa 552, 159 N. W. 255.

The defendant appealed from a judgment of conviction of the crime of conspiracy.

SALINGER, J. . . . .

III. Appellant takes the view that, by reason of the provisions of Code §5462, it becomes immaterial what record appellant makes below. For illustration, that we should reverse for giving instructions, though they were not excepted to; reverse for receiving testimony or failure to withdraw issues when no objection was made. It has been held that a new trial may be granted in an extreme case where utter incompetency of counsel prevented the defendant from having a fair trial. We have here no such case. At most, the counsel who appeared for the defendant in the trial below, and who do not appear for him on this appeal, were perhaps not as diligent in making objections and the like as they might well have been. But there is nothing in this record to relieve the defendant from *respondeat superior,* and from being bound by the acts of his agent. There is something more than the defendant to consider. It would be subversive of all orderly procedure, and utterly unfair to trial courts, if they may be reversed for doing what was, in effect, stipulated might be done. Be that as it may, there is certainly nothing in said statute which excuses the counsel for appellant from presenting his case here as the rules require. We know of no

reason why we should consider assignments without brief which declare that it was error to overrule motion in arrest of judgment; that it was error to refuse defendant the right to cross-examine the witness of the State, "as shown by the record;" that the court erred "in admitting testimony over objection of defendant, as shown by the record." The statute does not demand of us that we dispense with salutary rules of procedure where appellant is attempting to proceed under them, nor that we shall substitute ourselves for trial counsel. See *State* v. *O'Donnell,* 176 Iowa 337.

. . . . . .

On other grounds the judgment was

Reversed.

SECTION II

ARGUMENT OF COUNSEL

"When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the county attorney must commence, the defendant follow by one or two counsel, at his option, unless the court permit him to be heard by a larger number, and the county attorney conclude, confining himself to a response to the arguments of the defendant's counsel. Where two or more defendants are on trial for the same offense, they may be heard by one counsel each; and when the affirmative of the issue is with the defendant, the court may, in its discretion, award to the defendant the last argument. The court shall not restrict counsel as to time in arguments to the jury" (5372, C. C. 9434). Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial" (5484, C. C. 9464).

STATE *v.* BROWMAN

Supreme Court of Iowa, 1921. — Iowa —, 182 N. W. 823.

PRESTON, J. . . . .

7. To our minds the more serious question in the case is the alleged misconduct of counsel for the state in the closing argument

to the jury. We have some difficulty in understanding why prosecutors and lawyers of standing will take chances by making statements upon which the claim of misconduct may be made, or at least in not seeing to it that a complete record is made of the argument for defendant, so that we may have the case as nearly as may be as the trial court had it. We are compelled to reverse some cases upon an imperfect record and where we have only the closing argument. It is probable that some of them would not be reversed if we were in position to know the exact situation as the trial court observed it. For this reason we give some weight to the finding of the trial court that there was no prejudice. *State* v. *Cameron,* 177 Iowa, 379, 381, 158 N. W. 563. We recognize the fact, as stated in some of the cases, that defending counsel often go outside the record and make arguments for the purpose of securing an acquittal, because in that case there can be no new trial, but seek to hold counsel for the state to a more strict rule, and seek to make a like argument by the state a basis for a new trial by defendant in case there is a conviction. The rule of law is the same in both cases, but, as indicated, the argument for defendant is less often complained of, and frequently not contained in the record. The state has the right to answer argument advanced or invited by counsel for defendant, and, where the argument for defendant is not preserved, it will be presumed, nothing appearing to the contrary, that argument by the prosecutor was a legitimate response to argument for the defendant. *State* v. *Cameron, supra.* See, also, *State* v. *Christ,* 177 N. W. 54, 59. The presumption is aided somewhat in this case by the finding of the trial court that the arguments for both sides took a wide range, although the language used by counsel for defendant is not given. The defendant was ably defended below, and his case has been well presented here. We have no doubt but that counsel for defendant, as well as the state, used his ingenuity and generalship in presenting the case to the jury. There was, no doubt, more or less exaggeration by both sides, but in *State* v. *Hasty,* 121 Iowa, 507, 520, 96 N. W. 1115, we said that hyperbolical expressions have been indulged in always, and probably always will be, and that it would be undertaking too much to vindicate all expressions of opinion made in the heat of argument, and this is not essential to sustain a conviction. If not calculated to unduly arouse the passions or divert the jury from the proper discharge of their duty, the verdict should not be disturbed, even though the language used was disapproved. As said in *State* v. *Burns,* 119 Iowa, 663, 671, 94 N. W. 238, 241 (Weaver, J.):

"No lawyer has the right to misrepresent or misstate the testimony. And, on the other hand, he is not required to forego all the embellishments of oratory. . . . . It is his time honored privilege to

'Drown the stage in tears,
Make mad the guilty and
Appall the free.'

". . . . The sorrowing 'grey-haired parents,' upon the one hand, and the broken-hearted 'victim of man's duplicity,' upon the other, have adorned the climax and peroration of legal oratory from a time 'whence the memory of man runneth not to the contrary,' but these are not often effective in securing unjust verdicts."

And in State v. Gulliver, 163 Iowa, 123, 137, 138, 139, 142 N. W. 948, 954, the court, through Mr. Justice Weaver, says that—

"Jurors must be supposed to have some capacity to distinguish between the fury and fustian of partisan oratory and the rational analysis of testimony. . . . . Within reasonable limitations each side must be allowed to conduct its case in its own way. . . . . This liberty is, of course, not to be enlarged into unbridled license of defamation and abuse."

In that case counsel reflected unnecessarily upon the character of one of the witnesses and indirectly upon the defendant, but it was thought inconceivable that the jury was influenced thereby. In State v. Sale, 119 Iowa, 1, 92 N. W. 680, 95 N. W. 193, where there was a conviction of murder in the first degree, the court said:

"We are compelled to admit that portions of the argument, as quoted by counsel from the record, seem intemperate and unnecessarily violent in their character; but we have not in the record the argument of counsel for defendant in addressing the jury, and have no means of knowing to what extent the argument of the prosecuting attorney was justified . . . . by the presentation of the defendant's case. Moreover, no exceptions were taken to the prosecuting attorney's argument at the time, and objection cannot be first made on motion for a new trial, when, if it had been properly made, the court might have restrained any undue zeal on the part of the prosecuting attorney, and thus have prevented the prejudice which is afterward claimed to have resulted. Under the circumstances, we cannot grant a new trial on this ground."

See, also, *State* v. *Thomas*, 135 Iowa, 717, 109 N. W. 900, and *State* v. *Cooper*, 169 Iowa, 571, 151 N. W. 835, to the point that the objection must be timely, and that the trial court has a discretion in refusing a new trial unless it appears that the misconduct

was so prejudicial as to deprive the defendant of a fair hearing. In *State* v. *Tippet,* 94 Iowa, 646, 653, 654, 63 N. W. 445, we said that—

Counsel "has a right, within reasonable limits, to draw his own deductions as to facts from other admitted or proven facts. . . . Inferences of facts from facts and circumstances actually shown are permissible, and unless such right is abused, or it is shown that the prosecutor has acted in bad faith, or has intentionally violated the rules applicable to arguments to the jury, and that such acts have prejudiced the defendant, we should not interfere."

Enough has been said in reference to the revolver, Exhibit B, to show that the statement of counsel for the state that "this is his gun" was not an unwarranted inference. Doubtless counsel for defendant did not permit the jury to forget that defendant was facing the gallows or prison walls. Defendant's character was presented in its most favorable light, both by his evidence and probably in argument. Enough is shown by the argument in this court to justify such an inference, if indeed it was not more favorably stressed before the jury, that his parents were dead, that he was industrious and a good man, with some exceptions. No witnesses were introduced to show that defendant was a man of good character, but counsel say they had a right to rely upon a presumption that he was such, and that the state was not justified in attacking his character by referring to other offenses which the state claimed were connected with the killing, and other circumstances shown in the record. It is conceded by counsel for appellant that defendant was guilty of gambling—the record shows to a considerable extent—and that he was immoral, as shown by having girls at his home. In addition to this the jury could have found from the evidence that he was guilty of a criminal offense on at least two occasions in carrying concealed weapons. Under these circumstances the presumption of good character is not very strong. The circumstances which were in the record were proper to be considered as bearing upon the credibility of the defendant as a witness. The only remark in the closing argument for the state which was objected to was:

"Even though this man be innocent, he could not give his life in a better cause than to take punishment for the crime; if he goes to the gallows as an innocent man, and his going would create a disturbance that would cause the hundreds of boys and girls in Des Moines to see the light, and turn their steps toward sunlight instead of the night, he would wear a martyr's crown."

This may be thought intemperate. It was not boisterous or vicious. From the nature of the words used it could not be so. In other portions of the same argument counsel pointed out to the jury their responsibility, and stated in substance that it should rest its verdict on proven facts, on those things that are shown in the record that are practically undisputed and that point to the guilt of the defendant, and that the jury should take its own judgment, and not his counsel; but this did not ask or suggest to the jury that he be convicted if they thought he was innocent. He was claiming that under the evidence defendant was guilty. The statement, though not approved, was but another way of stating the necessity of protection of the public, and the deterring effect upon others, and that the offense is grave in consequences, and that an acquittal should not be lightly brought about. *State* v. *Cameron, supra,* 177 Iowa, 381, 382, 158 N. W. 564. As said in the *Hasty Case,* 121 Iowa at page 519, 96 N. W. at page 1119, if the crime was bitterly condemned, it may be said that the undisputed evidence as to the killing justified strong language. The opinion of the trial court is reflected in the record when he stated that—

"The arguments for both the defendant and the state assumed a wide range in the discussion of the facts and the evidence, and some things, particularly in the closing argument for the state, might better have been left unsaid, but the arguments as a whole were calm and dispassionate. . . . . Considering the arguments of both the attorney for the defendant and the closing argument of the attorney for the state, the court is of the opinion that no prejudice resulted therefrom. . . . . The whole trial was a most orderly proceeding, without an expression of approval or disapproval for either attorneys or any one in the audience."

There are cases holding that an argument may be so vicious as to show prejudice, and that a new trial may be granted even though no objection was made at the time. The other statements in argument are not of that character. The discussion of them is somewhat extended, and the opinion is already too long. The circumstances forbid a restatement of all the objectionable matter and the argument thereon.

We have given the case careful consideration, and we are satisfied from the record that the defendant is guilty, and that there is no prejudicial error.

The judgment is therefore affirmed.

SECTION III

INSTRUCTIONS

"Upon the conclusion of the arguments, the court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case" (5372, C. C. 9434). In all prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the facts" (5091, C. C. 8899), but on the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, saving the right of the defendant and the state to except; questions of fact are to be tried by the jury; and although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court" (5385, C. C. 9443).

"After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required must be given as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel" (5398, C. C. 9483).

"The rules relating to the instructions of juries in civil cases shall be applicable to the trial of criminal prosecutions" (5396, C. C. 9453, and see C. C. 7501, 7502–7505).

STATE *v.* HUNTER

Supreme Court of Iowa, 1902. 118 Iowa 686, 92 N. W. 872.

Having been convicted of murder the defendant appealed.

DEEMER, J. . . . .

IV. The instruction defining reasonable doubt is complained of. It is based on the well-known case of *State* v. *Ostrander,* 18 Iowa, 459, and, construed in connection with the one immediately preceding which put upon the state the burden of showing defendant's guilt "beyond every reasonable doubt," was not erroneous. In one instruction the court said, "By malice is meant not only anger, hate, and revenge, but any other unlawful and unjustifiable motive." The use of the word "anger" is criticised. Such use was approved in the famous case of *Com.* v. *Webster,* 5 Cush. (Mass.) 304 (52 Am. Dec. 711), and we are not disposed to quarrel with the definition there given, although there may be cases where it

would be improper to use the word. Not so here, however. The instructions with reference to reasonable doubt as to the degree of the offense were proper. We need not set them out, as to do so would unnecessarily extend this opinion.

Instructions 12½ and 13 are as follows: "12½. In determining what weight you are to give the evidence of the defendant, A. M. Hunter, the court instructs you that you are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction; and you are not bound to believe the testimony of the defendant any further than it may be corroborated by other credible evidence in the case. (13) Gentlemen of the jury, in committing this case to you, the court desires to admonish you of the important issues involved. The court desires you to fully understand the responsibilities upon you at arriving at your verdict in the case. No more solemn and weighty duty can devolve upon a citizen of the state than to pass upon an issue involving the life and liberty of a fellow citizen. On the one hand, you should remember that a failure to perform your duty, by which a crime, if one is shown, might go unpunished, and a criminal escape the penalty of his crime, cannot be corrected by a new trial, for the defendant cannot twice be put in jeopardy under our law. The state demands, and has a right to ask, at your hands, the full performance of your duty in the enforcement of the law, and no notions of mere sympathy and sentimentality should cause you to hesitate in the full performance of your duty. And, on the other hand, you should never for a moment forget your duty to secure and protect every right guarantied by the constitution and our law to the defendant. You should not allow any outside influence or pressure or indignation at *the crime* or sympathy for the deceased or his relatives to influence you in finding a verdict in this case. You should fairly and impartially and coolly and dispassionately examine the evidence in the case, and, after carefully and fully examining and considering it, render your verdict under the law and the evidence, that full and complete justice may be rendered thereby between the state and the defendant."

These are complained of. While the first is in the exact language of one approved in *State* v. *Mecum*, 95 Iowa, 433, that approval was as against the sole objection that it singled out defendant's evidence, and subjected it to criticism. The instruction was not given unqualified approval, and we do not think it should be. The effect of it was to treat the defendant as a witness already impeached,

and to lead the jury to think that he should be corroborated in order to be believed. There is no case which sustains this doctrine. The one which comes most nearly doing so is *Hirschman* v. *People,* 101 Ill. 568. But there the right to disregard was bottomed on the premise that the jury found the defendant had wilfully and corruptly testified falsely to a material fact in issue. That is a very different proposition from the one announced in the instruction now under consideration. The instruction should not have been given.

The thirteenth instruction is in the opinion of the writer, similar to one which is often given in cases of this character. In so far as it involves rules of law, the statements thereof are correct; and there was no error, I think, in emphasizing the importance of the case both to the state and to the defendant. The defendants' rights in the premises were, to my mind, properly guarded, except, perhaps, in the use of the words "the crime," which are italicized in the instruction quoted; and, with these words eliminated, there was no error, I think, in this paragraph. The instruction, except in the respects mentioned, has support, I think, in the following cases: *State* v. *Decklotts,* 19 Iowa, 447; *Stout* v. *State,* 90 Ind. 1; *Smith* v. *State,* 4 Neb. 288; *State* v. *Talbott,* 73 Mo. 347; *People* v. *Hawes* (Cal.) 33 Pac. Rep. 791; *Com.* v. *Harris* (Pa.) 32 Atl. Rep. 92; Blashfield Instructions Juries, sections 344, 345, and cases cited. The majority of the court, however, are of opinion that, because of the reference to the effect of an acquittal, the instruction as a whole was wrong, and should not have been given, for the reason that its tendency was to unduly influence the jury against the defendant, and that it contained a suggestion that, if they made a mistake in finding a verdict of guilty, it could be cured, while, if the defendant was acquitted, there was no remedy, and did not sufficiently guard the defendant's rights. In this view the writer does not concur, but, in view of a re-trial, we may with propriety say that all are agreed that the instruction, in the form in which it now appears, should be eliminated from a future charge.

. . . . . .

Reversed.

STATE *v.* SMITH

Supreme Court of Iowa, 1870. 28 Iowa 565.

On the trial of an indictment which charged the defendant with the wilful and malicious burning of a "certain building . . . . called a barn", the judge gave the following instruction to the

jury: "The indictment charges the defendant with setting fire to a *barn*. The evidence shows that the building was a cattle stable or shed; there is consequently a fatal variance between the indictment and the evidence, and you will render a verdict for the defendant." The state excepted to this instruction and appealed from the judgment of acquittal entered upon the verdict thus directed by the court.

WRIGHT, J. We are very clear that this instruction was erroneous. It took from the hands of the jury a question of fact as to whether there was conflict in the testimony, and which it was their province, and not that of the court, to determine. The State, equally with the prisoner, has a right to the opinion or verdict of the jury upon any question of fact which the testimony leaves in doubt. If this is not so, then as well abolish this method of trial.

Of course we do not say that the court might not direct an acquittal when there is *no testimony* sustaining the charge, or when it is so slight and indeterminate in its nature that a verdict of guilty would be instantly set aside. Not so, however, where there is conflict, and especially upon a question like that now before us.

As to these propositions there can be controversy. They are among the fundamentals of the law touching trial by jury in this country, and authorities, though most abundant, need not be cited in their support.

It is suggested, however, that as matter of law, in any view of the testimony, this was not a *barn*, because it was used exclusively for cattle or stock, no part of it being designed or used for hay, corn or other provender; that without this latter design or use it could not be a barn. In this view we do not concur.

The law punishes the willful and malicious burning of any . . . . *barn, stable,* . . . . *out-house,* or *any building whatever* of another. Rev. 4226. In this case the pleader describes the property as a "certain building *called a barn.*" It is not charged that the defendant burned *a barn* in its possible technical sense, but a building *called* a barn. That the testimony tends to show that it was *called* this, is clear beyond all room for controversy. If the prisoner burned this building, and this building was called a barn, he was guilty, and the jury should have so found. And this was what it was their right and duty to determine, and not the court's. Any other rule would, to say no more, make the command of the statute as to disregarding errors or defects which do not affect substantial rights (§4925) a dead letter.

But we go further and say, that the jury not only had a right

under the testimony to determine whether this was a building *called* a barn, but to decide whether it did not *in fact* fill the legal idea of such a building in the statute punishing arson. At common law, to burn a barn would not be arson unless it had in it hay or corn. This was also true under the act of 1767, in Pennsylvania, which followed the common law. There, however, the rule was changed and the burning of a barn was an offense, without reference to its contents. *Commonwealth* v. *Chapman*, 5 Whart. 427; and see *Samper* v. *Commonwealth*, 5 id. 385; 3 Chitty Cr. Law, 868; 1 Bishop Cr. Law, 306. At the common law, too, arson was the malicious *burning* of another's *house*, the words burning and barn being understood in a technical sense. In many of the States we find what are known as statutory burnings, and offenses thereunder are by no means confined to houses, as at common law, or to technical felonious burnings. They seem to comprehend that kind of burning which, at common law, constituted merely a misdemeanor, as well as those which were arsons or felonies. *Allen* v. *The State*, 10 Ohio St. 287, 302; and see note to §43; 2 Bishop Cr. Law; also Whart. Cr. Law, §1668; 1 Bouvier's Law Dict. 123, and cases there cited.

With us, the offense now under consideration is the burning of the building, whether barn, stable, or outhouse. And it is or may be a barn, whether used to receive the crop, for the stabling of animals, or other purposes. Bouvier's Dict. Lexicographers tell us that it is a covered building for receiving grain, hay, or other productions of the farm, and that in the northern states of this country the farmers generally use these buildings also for stabling their horses or cattle, so that among them a barn is both a corn-house and a stable. Webster's Dict., title barn. And, hence, most reasonably and naturally, one of the witnesses in the case says: "Americans would call this building a barn, we (Germans) call it a good shed, or good cattle shed." In accord with this testimony, we are justified in saying, is the experience and observation of us all. A building which in one part of our country would be known or called a shed, a stable, a barrack, in another would be styled a barn. Some include in the word "barn," as used in common conversation, buildings which others, by reason of differences of education, or other influences, would never think of thus designating. With us it is well known that many persons are accustomed to call every structure, whether used for stabling horses, cows, or stock of any kind, and whether designed for the storage of provender, or not, a barn. The statute must be construed in view of this meaning of

the word, as accepted, at least to some extent, by the community. And especially in view of the statute, as already suggested, which punishes the burning of any "*building* whatever of another;" and when the indictment declares that the building burned was *called* a barn, a stable, a shop, an outhouse, or any thing else, proof is competent that it is thus called and designated, though it may be used for a purpose other than that indicated. The effect of this proof is for the jury.

We conclude, therefore, that as matter of law, it was not necessary, to make this or any other building a barn, that it should be designed or used, in whole or in part, for the storage of hay, corn, or provender of any kind. And even if necessary, where the indictment should charge that the building was *in fact a barn* (which we are far from admitting), this is not so when it is alleged that the building was *known or called a barn*, as in this case.

In view of the law and the record, the instruction was erroneous. The question of fact should have been submitted to the jury.

STATE *v.* GARDNER

Supreme Court of Iowa, 1916. 174 Iowa 748, 156 N. W. 747.

Having been convicted of resorting to a house of ill fame for the purpose of prostitution and lewdness, the defendant appealed.

SALINGER, J. . . . .

III. Defendant asked the court to direct the jury to acquit on the ground that the indictment fails to charge the crime of lewdness. The offer asserts, *inter alia*, that the indictment fails to state any facts; that it sets out no acts constituting lewdness, nor states with whom committed. In effect the offered instruction attempts to operate as a demurrer to the indictment. It is not required that we pass upon whether the indictment is well criticised. The statute permits the points raised by the offer to be raised by demurrer (Code Sec. 5328) or by motion in arrest of judgment (Code Sec. 5426). Either method of attack being sustained, it is often possible to cure the defect by a new accusation. We think it fairly appears to be the legislative intent that such an attack upon the indictment shall not be made at a time when to sustain it must result in a final acquittal; that the defendant may not decline to use his right to demur nor anticipate his right to proceed by motion in arrest, and substitute for both an offered instruction which, if given, works an acquittal, thus obtaining a result which the employment of neither of the other methods would yield. Why provide for a demurrer, with power of resubmission, if same be

sustained? Why provide for a second opportunity to demur by means of a motion in arrest if, at the pleasure of the defendant, neither may be used, and an acquittal be obtainable by attacking the indictment by means of an offered instruction? Who would ever use demurrer or motion in arrest if this be permissible? We can see no justification for the defendant's waiting until all the evidence has been taken on both sides to so present a demurrer to the indictment; no reason why he should not present it before the trial is actually begun; why, having passed this point, he should be allowed to anticipate the time, if ever it shall come, when he need present a motion in arrest of judgment. To make him proceed either at the one time or the other, rather than between the two, is not only orderly procedure, but absolutely fair to both the State and the defendant. It takes nothing justly due from defendant, and, as said, avoids the making said two statutes idle.

The nearest that the motion in arrest of judgment and for new trial comes to attacking the indictment is a statement that the court erred in not giving each and every paragraph of the instructions asked by the defendant. Waiving the question of definiteness in assignment, it remains the fact that this is merely a repetition of the exception taken to the refusal to give said offered instruction. As we hold that it was right to refuse the instruction, it was also right to overrule that part of the motion in arrest of judgment which complains of the refusal to give such instruction.

We must decline to review the sufficiency of the indictment with reference to charging facts, because no attack recognized by law was below made upon the indictment. This disposition of the attack upon the indictment, and also that almost all of them are irrelevant on such attack, make the following citations of appellant ineffective: *State* v. *Wasson,* 126 Iowa 320; *State* v. *Chicago, B. & Q. R. Co.,* 63 Iowa 508; *State* v. *Potter,* 28 Iowa 554; *State* v. *McKinney,* 130 Iowa 370; *State* v. *Brandt,* 41 Iowa, at 607, 608; *State* v. *Martin,* 125 Iowa 715; *State* v. *Brown,* (Ohio) 21 Am. St. 790; *State* v. *Bauguess,* 106 Iowa 107; *State* v. *Ashpole,* 127 Iowa 680; *Cosgrove* v. *State,* (Tex.) 66 Am. St. 802; and so are *Webb* v. *State,* (Ala.) 18 So. 491; *Commonwealth* v. *Wardell,* 128 Mass. 52, cited by the State.

. . . . . .

For other reasons the judgment was

Reversed.

SECTION IV

MOTIONS

If during the trial an occasion arises which entitles either the defendant or the state to some special rule or order, a motion therefore may be made such as a motion to strike out evidence that has been introduced but which should not go to the jury.[1] Requests for instructions to the jury, which must be in writing (C. C. 7500) are called "requests".

[1] See *State* v. *Hossack* (1902), 116 Iowa 194, 202, 89 N. W. 1077.

CHAPTER XIV

THE VERDICT

"The jury must render a general verdict of 'guilty' or 'not guilty,' which imports a conviction or acquittal on every material allegation in the indictment, except upon a plea of former conviction or acquittal of the same offense, in which case it shall be 'for the state' or 'for the defendant,' and except in cases submitted to determine the grade of the offense and, when authorized, fixing the punishment therefor. It must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required" (5405, C. C. 7487).

"Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal" (5376, C. C. 9488). "Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree" (5377, C. C. 9489). "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment" (5406, C. C. 9490). "In all other cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment" (5407, C. C. 9491). "On an indictment against several, if the jury cannot agree upon a verdict as to all, it may render a verdict as to those in regard to whom it does agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury" (5408, C. C. 9492). "Upon an indictment against several defendants, any one or more may be convicted or acquitted" (5384, C. C. 9493).

"When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge; the names of the jurors must then be called, and if all do not appear the rest

must be discharged without giving a verdict; in such case, the cause may again be tried at the same or another term" (5402, C. C. 9494). "If the indictment be for a felony, the defendant must be present at the rendition of the verdict; if it be for a misdemeanor, it may be rendered in his absence" (5403, C. C. 9495). "When the members of the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must declare the same" (5404, C. C. 9496).

"If the jury renders a verdict which is neither a general nor special one, the court may direct it to reconsider it, and it shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood, whether to render a general verdict, or to find the facts specially and leave the judgment to the court" (5409, C. C. 9497). "If the jury persists in finding an informal verdict, from which, however, it can be understood that the intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue, or judgment is given against him upon a special verdict" (5410, C. C. 9498). "When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case each member thereof shall be asked whether it is his verdict, and if any one answers in the negative the jury must be sent out for further deliberation" (5411, C. C. 9499).

"When the verdict is given and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of the members thereof whether it is their verdict. If any juror disagrees, the fact must be entered upon the record and the jury again sent out. But if no disagreement is expressed, the verdict is complete and the jury must be discharged from the case" (5412, C. C. 9500). "If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given" (5413, C. C. 9501). "If the defense is insanity of the defendant, the jury must be instructed, if it acquits him on that ground, to state that fact in its verdict. The court may thereupon, if the defendant is in custody, and his discharge is found to be dangerous to the public peace and safety, order him committed to the insane hospital, or retained in custody, until he becomes sane" (5414, C. C. 9502).

PART IV

PROCEEDINGS AFTER VERDICT

CHAPTER XV

NEW TRIAL

"A new trial is a reexamination of the issue in the same court before another jury, after a verdict has been given" (5422, C. C. 9510). The application therefore "can be made only by the defendant, and must be made before judgment" (5425, C. C. 9511). "The granting of a new trial places the parties in the same position as if no trial had been had; all the testimony must be produced anew and the former verdict can not be used or referred to either in the evidence or in argument" (5423, C. C. 9513). It may be granted "for the following causes, or any of them.

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;
2. When the jury has received any evidence, paper or document out of court not authorized by the court;
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;
4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;
5. When the court has misdirected the jury in a material matter of law;
6. When the verdict is contrary to law or evidence; but no more than two new trials shall be granted for this cause alone;
7. When the court has refused properly to instruct the jury;
8. When from any other cause the defendant has not received a fair and impartial trial" (5424, C. C. 9512).

PACKARD *v.* UNITED STATES

Supreme Court of Iowa, 1848. 1 G. Greene 225.

Opinion by HASTINGS, C. J. In this case the plaintiff was indicted for perjury, and found guilty as charged in the indictment, and fined one dollar, and sentenced to be imprisoned one hour.

This case is brought into this court by writ of error, and plaintiff has assigned fourteen errors. We will consider only the fifth assignment of errors, not deeming it important or necessary to pass upon the other errors assigned.

The fifth assignment is as follows: "The court below, erred in refusing to receive the oaths of jurors, in support of the affidavit of the said Packard, which affidavit sets forth that the jury entirely misunderstood the instructions of the court."

After the jury returned their verdict, the defendant filed his motion to set the same aside, and to grant a new trial; and also in arrest of judgment. And in support of his motion, assigned the reason that the jurors misunderstood the instructions of the court; filed his own affidavit of the fact, and proposed to prove the same by several of the jurors.

The defendant based his motion on many other reasons, and the court overruled the motion. Whereupon the defendant took exceptions, and embodied the evidence and motion in a bill of exceptions.

The defendant was found guilty by the jury, as he stood charged in the indictment, of the crime of perjury, one of the highest crimes in the criminal code; and to punish the defendant for such a crime, the jury assessed a fine of one dollar, and imprisonment of one hour. The fine and imprisonment assessed by the jury are inconsistent with that part of the verdict finding the defendant guilty, as he stands charged in the indictment; and although for this reason alone, the court would not be authorized to set aside the verdict of the jury, yet we may reasonably presume that the jury labored under a misapprehension of the facts submitted in evidence, or a misunderstanding of the instructions of the court; and we think the court erred in refusing to receive the oaths or affidavits of the jurors, in support of defendant's affidavit, that the jury misunderstood the instructions of the court. It is true that courts ought not to receive the affidavits of jurors, to impeach the conduct of their fellows, but they may be received to show misconduct of the parties. *Denn,* ex dem. *Cheins* v. *Driver,* Coxe, 109. From a careful examination of the authorities referred to in plaintiff's brief, we have no doubt that in a criminal case, affecting the life and liberty of the accused, the court ought to receive the testimony of jurors as to any palpable misapprehension of the instructions of the court, as no person is so competent as the juror himself, to prove a misunderstanding of the charge of the court, especially when, as in this case, the defendant shall make his affidavit in open court, and

show therein that the court instructed the jury so unintelligibly, or that the jury so misunderstood and misconstrued the instructions of the court, that a verdict of guilty is found against him, when by the law and evidence he should have been acquitted.

We are of the opinion also, from an examination of the evidence in the bill of exceptions, that defendant's motion to set aside the verdict and grant a new trial, should have been granted; and that the majesty of the laws would suffer far less, and be much better sustained, by an acquittal of the defendant, than by encouraging the pernicious example of such a verdict, assessing a fine and imprisonment so inadequate to the turpitude of the crime.

We are sustained in the above opinion by the decision in the case of *State* v. *Hascall*, 6 N. Hamp. 352, in which the question about the testimony of jurors was fully discussed, and numerous authorities reviewed.

And therefore, the judgment and proceedings of the district court, subsequent to the plea of the defendant, and the making up the issue to the country, must be reversed and set aside, and the case remanded with instructions to award a *venire de novo*, and proceed to trial with the issue.

Judgment reversed.

STATE *v.* HILTON AND GORDON

Supreme Court of Iowa, 1867. 22 Iowa 241.

"The defendants stand indicted for stealing a certain quantity of horseshoes, from the blacksmith shop of one Jacob Ludwig. The record shows that the defendant Gordon was alone put upon trial, against whom the jury returned a verdict of guilty.

"The overruling of a motion for a new trial, filed because the verdict was not sustained by the evidence, is the error assigned."

Lowe, Ch. J. The guilt or innocence of the defendant is a question in which the appeal lies to the testimony in the cause. This was exclusively circumstantial. But these circumstances, when closely examined, strike us as rather too remote, light and inconclusive to establish defendant's guilt or to justify the verdict rendered in the premises. And we cannot but feel, after a careful consideration of the same, that the evidence is so lacking in affirmative force to generate a belief of probable guilt, that the issue between the State and the prisoner had better be re-submitted to the determination of a second jury. For this purpose we order a new trial and remand the cause.

Reversed.

STATE *v.* FOSTER

Supreme Court of Iowa, 1873. 37 Iowa 404.

Having been convicted of embezzlement, the defendant appealed.

BECK, CH. J. . . . .

II. A motion for a new trial because of newly-discovered evidence was overruled. We think it should have been sustained.

Evidence as to the character of the watch and its value, showing it to be worth $95, was given by the state. No evidence upon this point was introduced by the accused. His own affidavit and that of his counsel we think show the fact that they were not in possession at the time of the trial, of the names of any witnesses by whom the evidence on the part of the State as to the value and character of the property, could have been contradicted. It is shown by the affidavits of these witnesses that the watch is of base metal and only of the value of $10 or $15. It does not appear that any fault or negligence can be properly attributed to defendant or his counsel in not introducing the evidence of these or of other witnesses upon the point at the trial; in fact the showing made is such that we must conclude that they were unable from ignorance of the names of the witnesses to do so.

The attorney-general suggests that the evidence claimed to be newly discovered, is but cumulative on the ground that one of the witnesses of the State does not give as high description of the character of the watch as the prosecuting witness. But nothing was said by him as to its value, and defendant's counsel in the exercise of proper prudence may well have feared to venture upon an attempt to establish a point in the defense by one of the state's witnesses.

The importance of the evidence cannot be questioned, for it is upon a fact which, if established, would reduce the offense from a felony to a misdemeanor.

For the error of the district court in overruling the motion for a new trial on the ground of newly-discovered evidence the judgment is

Reversed.

STATE *v.* DIMMITT

Supreme Court of Iowa, 1893. 88 Iowa 551, 55 N. W. 531.

Having been convicted of burglary, the defendant appealed.

ROBINSON, CH. J. . . . .

II. In support of a motion for a new trial, the defendant offered the testimony of a witness to the effect that he was present when

the butter was sold, after it was stolen, and that it was not sold by the defendant. The defendant asked that the testimony so offered be regarded as newly discovered evidence, and considered as a part of the motion for a new trial. The testimony so offered was given by a person who had testified as a witness on the trial, and no diligence whatever to ascertain, before or during the trial, what he knew about the person who sold the butter, is shown, although it appeared that he was employed at the time by the person who purchased the butter at the place where it was sold. Therefore, the defendant would not have been entitled to a new trial, had newly discovered evidence been a ground for granting it. That a new trial can not be granted in a criminal case on account of newly discovered evidence has been repeatedly decided by this court. *State* v. *Potts,* 83 Iowa, 317.

We have examined the record with care, but without finding any ground upon which the judgment of the district court ought to be disturbed. It is therefore

Affirmed.

CHAPTER XVI

ARREST OF JUDGMENT

A motion in arrest of judgment, which may be made at any time before or after judgment, during the same term (5429, C. C. 9515), "is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground of demurrer.

2. When upon the whole record no legal judgment can be pronounced" (5426, C. C. 9514). "The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion" (5427, C. C. 9516).

"If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination" (5428, C. C. 9517).

STATE *v.* STEIDLEY

Supreme Court of Iowa, 1907. 135 Iowa 512, 113 N. W. 333.

BISHOP, J. . . . .

VIII. The motion for new trial having been overruled, the defendant filed a motion in arrest of judgment, and this was overruled. As the motion was not based on any ground known to the statute, there was no error.

We conclude that the defendant was rightfully convicted; and the judgment is

Affirmed.

STATE *v.* YOUNG

Supreme Court of Iowa, 1911. 153 Iowa 4, 132 N. W. 813, Ann. Cas. 1913 E 70.

Having been convicted of perjury, the defendant appealed.

LADD, J.—The defendant has been tried three times. The first indictment charged him with having given whisky to Will Gordon, a person in the habit of becoming intoxicated. On trial he was

acquitted. At the same term of court he was indicted for having committed perjury during the above trial, in that he had falsely testified that he had neither given whisky to said Gordon in a certain barn or paintshop on the 14th day of November, 1909. Though he was acquitted of the charge of having furnished his neighbor whisky, he was found guilty of having falsely testified that he had not done so. But on motion in arrest of judgment the verdict was set aside, and the case submitted to another grand jury. A second indictment charging the same offense was returned, and he was again found guilty and judgment entered accordingly. The appeal is from this conviction.

I. Appellant contends that the court erred in not passing on the ninth ground of the motion in arrest of judgment, and in not discharging him, for that the issue alleged was not involved in nor the alleged false testimony material on the trial of the indictment charging him with giving whisky to said Gordon. That indictment alleged the giving to have been in the county generally, and it is said that, even though the accused did falsely testify that he had not given Gordon whisky in the barn or paintshop, such evidence was immaterial, for that it did not appear that any one had testified otherwise. If this were true, his testimony would not have been in conflict with any evidence introduced by the state, but it would have been material as tending to show that he had not furnished the whisky in the county. This becomes apparent in looking at the result had he testified to the truth as claimed by the state; i. e., that he had given Gordon whisky at one of the places mentioned. Had he done so, his testimony would not only have been material, but likely conviction would have followed. Plainly enough, then, his denial that he had given the whiskey at the place mentioned should be regarded as material.

Even were this not so, however, the point could not properly be raised on motion in arrest of judgment. Section 5426 provides that such a motion may be granted (1) upon any ground which would have been ground for demurrer (2) when upon the whole record no legal judgment can be pronounced. It is needless to say that the insufficiency of evidence is not ground for demurrer. Nor do we think the evidence a part of the "record," as that term is used in this statute. It only becomes such when duly certified and filed as a bill of exceptions for the purposes of appeal. Their view is confirmed by section 5424 of the Code, making the insufficiency of the evidence one of the grounds for new trial, and farther by the overwhelming weight of authority declaring that neither the

admissibility of evidence nor its insufficiency nor the correctness of the instructions can be challenged by motion in arrest of judgment. *State* v. *McCool,* 34 Kan. 617, (9 Pac. 745); *State* v. *Gerrish,* 78 Me. 20, (2 Atl. 129); *Green* v. *State* (Tex. Cr. App.), 29 S. W. 1072; *Bright* v. *State,* 90 Ind. 343; *Powe* v. *State,* 48 N. J. Law, 34, (2 Atl. 662); *State* v. *Washington,* 104 La. 443, (29 South. 55, 81 Am. St. Rep. 141). See cases collected in 2 Ency. Pleading & Practice 813, and 12 Cyc. 759. The record in a criminal case ordinarily is understood to be the written history of the proceedings from the beginning to the end, including such papers as are made by statute a part of the record and the evidence. *United States* v. *Taylor,* 147 U. S. 695, (13 Sup. Ct. 479, 37 L. Ed. 335); *State* v. *Anders,* 64 Kan. 742, (68 Pac. 668). There was no error in the ruling.

. . . . . .

Affirmed.

STATE *v.* HEFT

Supreme Court of Iowa, 1912. 155 Iowa 21, 134 N. W. 950.

From a conviction of incest the defendant appealed.

McClain, C. J. . . . .

II. In defendant's motion for arrest of judgment the specific point is made for the first time in the case that the record does not show a compliance with the statutory provision that "every indictment must be indorsed 'a true bill,' and the indorsement signed by the foreman of the grand jury." Code, section 5274. It does appear from the record that "this bill of indictment was presented in open court in presence of the grand jury by their foreman, and is now filed in presence of the court and in presence of the grand jury this 23d day of February, A. D. 1909." This recital found on the back of the indictment itself is signed by the clerk of the court into which the indictment was returned and in which the defendant was tried. In the face of such recital, the failure of the foreman to sign an indorsement printed on the back of the indictment that it was "a true bill" can not be regarded as an irregularity of such vital nature that it can be successfully raised for the first time in a motion for arrest of judgment or on appeal to this court. There is a specific provision as to the time and manner for raising such an objection. A ground for motion to set aside the indictment before demurrer or plea is that the indictment "is not indorsed 'a true bill' and the indorsement signed by the foreman of the grand jury as prescribed by this Code." Code, section 5319.

The record shows that the defendant did at a proper time move to set aside the indictment, but it does not appear that this ground was relied upon in the motion, and there is no complaint of the action of the court in overruling such motion. It is plain, therefore, that the defendant either failed to raise the objection in the method pointed out by statute, or, having raised it, acquiesced in the ruling of the court that the objection was not in fact well taken. There is nothing in the section relating to motion in arrest of judgment already quoted which would justify the inference that it was the intention of the Legislature that such an objection as this, not interposed at the time and in the method prescribed by the statutes relating to criminal procedure, can be relied upon as a ground for arrest. On the contrary, it has been held in this jurisdiction that failure of the foreman of the grand jury to indorse the indictment as "a true bill" is not a fatal defect in the proceedings where it otherwise appears that the grand jury returned the indictment into court, and that such defect is waived if not taken advantage of before trial. *Waukon-chaw-neek-kaw* v. *U. S.*, Morris, 332; *Hughes* v. *State,* 4 Iowa, 554. And it has been so held in other jurisdictions. *Frisbie* v. *U. S.,* 157 U. S. 160 (15 Sup. Ct. 586, 39 L. Ed. 657); *State* v. *Agnew,* 52 Ark. 275 (12 S. W. 563); *State* v. *Brannan,* 206 Mo. 636 (105 S. W. 602). Many other authorities might be cited in support of this proposition, but in the cases which we have cited there are ample references to other cases in which the same conclusion has been reached. Counsel have called our attention to a few cases apparently not well considered in which the opposite conclusion is announced. See, for example, *Nomaque* v. *People,* Breese (1 Ill.) 145 (12 Am. Dec. 157); *Whitley* v. *State,* 166 Ala. 42 (52 So. 203); *State* v. *Logan,* 104 La. 254 (28 So. 912). Cases holding that a motion to quash on this ground should be sustained are, of course, not here in point. See *Code* v. *State,* 169 Ind. 393 (82 N. E. 796); *State* v. *Buntin,* 123 Ind. 124 (23 N. E. 1140).

. . . . . .

Affirmed.

STATE *v.* BOGGS

Supreme Court of Iowa, 1914. 166 Iowa 452, 147 N. W. 934.

The defendant appealed from a judgment of conviction of the crime of embezzlement.

EVANS, J. . . . .

II. The defendant assails the sufficiency of the indictment, because it fails to state the name of the person from whom the defendant collected the funds which he later embezzled, as alleged. As

already indicated, the indictment is based upon section 4842. The indictment follows the language of the statute. The contention of appellant is that the name of the person from whom the defendant collected funds was one of the essential "facts constituting the offense," within the meaning of section 5280; and that it was one of the "particular circumstances . . . . necessary to constitute a complete offense," within the meaning of section 5282; and that it was necessary to state such fact "to enable a person of common understanding to know what is intended," within the meaning of section 5289. The point here made has never been passed upon heretofore by this court. Appellant cites a number of cases from other jurisdictions wherein it has been held necessary to allege in the indictment the name of the person from whom the embezzled funds were received. The cited cases, however, all involve embezzlements by bailees. They all recognize a distinction between embezzlement by bailee and that by a person acting as an agent. Whether the distinction is such as to justify a different requirement of allegation in the indictment we will not now stop to consider. Decisions in other states necessarily rest upon their own respective statutes, and these are seldom identical.

The question here presented was first raised by motion in arrest of judgment. It is urged by the state that the objection came too late, and that the defendant is precluded from making it by the recent enactment of the Legislature. Chapter 227, Acts 33d General Assembly. Section 9 of such chapter is as follows:

9. All objections to the indictment relating to matters of substance and form which might be raised by a plea in abatement shall be deemed waived if not raised by the defendant before the jury is sworn on the trial of the case.

It is urged, therefore, that the objection now made is one which under the provisions of this new legislation, should have been made before trial. The defendant did demur to the indictment on the general ground as follows:

That it does not substantially conform to the requirements of the Code.

It is his contention now that this demurrer necessarily raised every question and assailed every defect in the indictment. This argument is based upon the theory that such demurrer conformed to the statutory form as prescribed in section 5328. Such section is as follows:

The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this Code;

2. That the indictment contains matter which, if true, would constitute a legal defense or bar to the prosecution.

It will be noted that the first paragraph of the section relates to defects in the indictment, viz., failure to conform to statutory requirements.

The second relates to affirmative matters appearing upon the face of the indictment which of themselves constitute a bar to the prosecution. The requirements of an indictment are set forth in numbered paragraphs in sections 5280 and 5289. Can it fairly be said that the demurrer before us fairly raised the question of the alleged defect in the indictment in failing to state the name of a person, so as to meet the requirement of section 9, Chapter 227, Acts 33d General Assembly, as above quoted. To so hold would be to reduce such legislation to nothing. If the defendant was entitled to more specification in the indictment, it would be on the ground that he was entitled to be advised in advance of the particular charge which he was called upon to defend against. The very purpose of the later legislation is to require that such questions shall be raised and determined in advance of a trial, rather than afterwards. The defendant necessarily knows at that time whether he is sufficiently advised of the particular charge made against him. There is no claim in the case at bar of any actual surprise on the part of the defendant or his suffering any disadvantage in preparing his defense for want of specific allegation as to the name of Nelson. Indeed, he testified on the trial that he understood that the indictment had reference to the Nelson case, and that he prepared his defense accordingly. This, of course, would not cure the defect, if any, in the indictment. But it is illustrative of the artificiality of a defendant's technical right to a perfect indictment, and of the evil sought to be reached by the later legislation.

The question arises whether section 9 above quoted is sufficient in its terms to cover objections to the indictment which could have been raised only by demurrer. The language of such section refers to objections "which might be raised by plea in abatement." Can a demurrer be said to be the equivalent of a "plea in abatement," within the meaning of this section? The term, "plea in abatement", is manifestly used in contradistinction to a "plea in bar." Attack upon an indictment for defect or insufficiency of statement is an attack in abatement. If successful, judgment thereon will not operate as a bar to further prosecution. Code, sections 5326,

5341. There is no provision in express terms in our statutes for a "plea in abatement" to an indictment. The function of such plea is provided for by a demurrer on the first ground stated in section 5328. No other method of attack in abatement for defect of form in the indictment is provided. As a mere matter of technical terminology, therefore, it may be urged that section 9 is rendered nugatory by the inaccuracy of its terms. However, a demurrer is a "pleading." Code, section 5327. On the other hand, it must be conceded that it is not a "plea to the indictment," within the meaning of section 5333, which limits such pleas to three forms. The cited sections are as follows:

Section 5327. The only pleading on the part of the defendant is a demurrer or plea.

Section 5333. There are but three pleas to the indictment—(1) guilty, (2) not guilty, or (3) of a former judgment of conviction or acquittal of the offense charged.

In a broad sense, however, a "pleading" and a "plea" are synonymous in many respects. They are so treated in the dictionaries. Among the definitions of "plea" in Webster's New International Dictionary, is the following:

2. Law. An allegation made by a party in support of his cause; a pleading. . . . .

4. That which is alleged or pleaded, in defense, excuse, or justification; a pleading.

If the language of section 9 had purported to refer to objections which might be raised by "pleading in abatement," there could be no question of its application to the case before us. We think it very manifest that such is the sense in which the expression "plea in abatement" is used in such section. We hold, therefore, that a demurrer upon the first ground of section 5328 is a "plea in abatement," within the meaning of section 9, chapter 227, Acts 33d General Assembly. We hold further that the demurrer filed by the defendant in this case was not sufficiently specific to raise the objection now urged as a defect in the indictment, and that therefore such objection is not now available to the defendant by a motion in arrest.

. . . . . .

Affirmed.

CHAPTER XVII

JUDGMENT

"A finding of fact does not constitute a conviction. There must be also the judgment of the court,"[1] which, formally pronounced "upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted" is a "sentence".[2]

The court must render a judgment of acquittal immediately upon a verdict of not guilty or special verdict upon which a judgment of acquittal must be given (5430, C. C. 9518). But "upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment, which must be at least three days after the verdict is rendered, if the court remains in session so long, or, if not, as remote a time as can reasonably be allowed; but in no case can it be pronounced in less than six hours after the verdict is rendered, unless defendant consent thereto" (5431, C. C. 9519). The defendant must be present in person if the conviction is for a felony, but this is not necessary if it is for a misdemeanor (5432 and see 5433–5434, C. C. 9520, 9521–9522).

"When the defendant appears for judgment, he must be informed by the court, or the clerk under its direction, of the nature of the indictment, his plea, and the verdict, if any, thereon, and be asked whether he has any legal cause to show why judgment should not be pronounced against him" (5435, C. C. 9523). "He may show for cause against judgment that he is insane, or any sufficient ground for a new trial, or in arrest of judgment" (5436 and see 5437, C. C. 9524, 9525). "If he moves for a new trial or in arrest of judgment, the court shall defer the judgment and proceed to hear and decide the motions. If no sufficient cause is shown why judgment should not be pronounced, and none appears to the court upon the record, judgment shall be rendered" (5438, C. C. 9526). "If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment

---

[1] *State* v. *Powers* (1912), 156 Iowa 251, 257, 136 N. W. 315, Ann. Cas. 1915 B 280.

[2] Black's Law Dictionary.

may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any of the other offenses'' (5439, C. C. 9527).

''When any person over sixteen years of age is convicted of a felony, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted'' (C. C. 9528, 9529).

''A judgment that the defendant shall pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine'' (5440, C. C. 9531). ''Judgments for fines, in all criminal actions rendered, are liens upon the real estate of the defendant, and shall be entered upon the lien index in the same manner and with like effect as judgments in civil actions'' (5531, C. C. 9534).

STATE *v.* WADDELL

Supreme Court of Iowa, 1883. 61 Iowa 247, 16 N. W. 119.

''The defendant is sheriff of Sac county, and had the plaintiff in his custody under a warrant issued by a justice of the peace, committing the defendant to jail, because of his conviction of a crime by the justice of the peace. On the alleged ground that the judgment of the justice was void, that plaintiff applied for, and there was issued, a writ of *habeas corpus*. Upon the hearing the court refused to discharge the plaintiff, and remanded him to the custody of the sheriff. The plaintiff appeals.''

SEEVERS, J.—The statute provides: ''The justice rendering a judgment against a defendant must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal by giving notice orally to the justice that he appeals, and the justice must make an entry on his docket of the giving of such notice.'' Code, §4697.

The justice failed to inform the plaintiff of his right to an appeal, and failed to make such an entry on his docket. Because of this omission it is said that the judgment of conviction rendered by the justice is void, and the plaintiff entitled to a discharge. The learned judge before whom the hearing on *habeas corpus* was had ordered that the ''appeal bond be fixed at $100, in case the relator shall desire to appeal from said judgment,'' and remanded the appellant

to the custody of the defendant. We think the relief granted the plaintiff was all he was entitled to. The plaintiff is presumed to know the law, and he was clearly entitled to an appeal, notwithstanding the omission of the justice. If he had expressed a desire to appeal, the justice, without doubt, would have fixed the amount of the bond. Because of the omission of the justice, the plaintiff was not deprived of any substantial right. The judgment remained in full force, although the justice failed to inform the plaintiff that he was entitled to an appeal. In principle this case is not different from *Murphy* v. *McMillan,* 59 Iowa, 515. Following that case, the order of the judge of the district court must be

Affirmed.

STATE *v.* WATROUS

Supreme Court of Iowa, 1862. 13 Iowa 489.

WRIGHT, J. . . . .

VIII. It is finally claimed that the judgment was pronounced within less than three clear days after the verdict was recorded. This question was made in the case of *The State* v. *Marvin,* 12 Iowa, 502. There, however, the record failed to show that the term continued three clear days after the rendition of the verdict, and we could not, therefore say that there was error, in view of the provisions of the statute. (§4861.) In this case, the record tends to show that the court remained in session for about three weeks after the reception of the verdict. This is not controverted by the Attorney-General, and is, therefore, regarded by us, for the purposes of this case, as true.

It seems that the defendant was arraigned for judgment more than six hours "after the bringing in of the verdict." But the statute is imperative, that if the court remains in session so long, "the time appointed for judgment, must be at least three clear days after the verdict is recorded," but in no case can it be pronounced in less than six hours thereafter. (§4861.) Unless the record quite clearly rebuts all presumption of prejudice, we do not see how we are to disregard these plain requirements. The language of the statute is imperative. The reason for it, we can readily apprehend. With its wisdom, we have nothing to do. The presumption of prejudice is not sufficiently rebutted in this instance, and, we therefore, feel constrained to remand the cause, not for new trial, but for judgment upon the verdict, defendant having leave to show cause against the same, but not such as have already been passed upon by the court below.

JACKSON *v.* BOYD

Supreme Court of Iowa, 1880. 53 Iowa 536, 3 N. W. 734.

"The plaintiff, being in custody of the defendant by virtue of certain 'warrants of commitment' issued by a justice of the peace, applied for and obtained a writ of *habeas corpus*. Upon the hearing before said judge he was discharged from custody under certain warrants and remanded under others. Both parties appeal."

SEEVERS, J.—It is insisted the order discharging the plaintiff from custody may be sustained on the following grounds:

I. It is said the judgment of the justice of the peace is "void because it did not specify the length of time and number of days the plaintiff should be imprisoned." The judgment was that the plaintiff "stand committed to the jail of the incorporated town of Eldora until the several fines and costs are paid."

The statute provides that: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied." Code, §4689. "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine." Code, §4509.

The provision that the justice may direct the time the defendant shall be imprisoned is not mandatory, but is simply directory. If the justice fails to so state or direct in the judgment this would not render it void. The extent of the imprisonment is fixed and declared by the statute, and when the defendant has been imprisoned the required length of time he is entitled to be discharged.

. . . . . .

The result is that the order of the judge below is reversed on the defendant's appeal, and affirmed on the appeal of the plaintiff.

EX PARTE TUICHER

Supreme Court of Iowa, 1886. 69 Iowa 393, 28 N. W. 655.

"*Habeas Corpus.* The petitioner for the writ was convicted under the statutes prohibiting the sale of intoxicating liquors, fined, and committed to the jail of Sac county until the fine and costs should be paid. A writ of *habeas corpus* was granted by one of the justices of this court for the purpose of determining the legality of such imprisonment.

SEEVERS, J.—The judgment of the court was rendered on the twenty-second day of February, 1885, and on that day the petitioner was committed to jail, and he remained therein until the

twenty-first day of May, 1885, when the writ was granted, being a period of eighty-eight days. The amount of the fine was seventy-five dollars, and the costs were less than twenty dollars. Section 4509 of the Code is in these words: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine. The court failed to direct the length of time the petitioner should be imprisoned, which, under the foregoing section, would have been less than thirty days. It is, however, said that this is discretionary, and that the court is not required to cause the convicted person to be imprisoned. This is true, but when imprisonment is imposed under any statute we think the court must fix the extent of the imprisonment, and in this respect the statute is mandatory. *State* v. *Myers*, 44 Iowa, 580.

. . . . . .

(The prisoner was discharged from custody.)

GALLES *v.* WILCOX

Supreme Court of Iowa, 1886. 68 Iowa 664, 27 N. W. 816.

.."*Habeas Corpus.* Upon a hearing of the cause, it was adjudged that plaintiff be remanded to the custody of defendant, the sheriff and jailer of the county. The facts of the case fully appear in the opinion. Plaintiff appeals."

BECK, J.—I. The plaintiff was convicted upon an indictment for a crime, and sentenced to pay a fine of $100, and to be imprisoned until the fine be paid, "not to exceed thirty days." Upon this judgment a warrant was issued, and thereon plaintiff was committed to jail. After he had been imprisoned he paid $25 upon the fine. When he had served twenty days he claimed discharge on the ground that his fine had been reduced by payment, and that he could be no longer imprisoned than one day for every three and one-third dollars of the fine remaining unpaid.

II. Counsel bases his claim for the correctness of the position upon Code, §4509, which is in these words: "A judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine." The duration of the imprisonment was determined, under this section, by the amount of the fine. That duration was thirty days. It was fixed and certain, and did not depend upon future partial payments of the fine. The judgment was that he

should be imprisoned for thirty days, unless the fine should be sooner paid. The term of imprisonment was for the whole fine. The statute does not contemplate that the convict shall himself control and direct the manner of the enforcement of the judgment against him by choosing to serve in jail for a part of his fine, and to pay the balance of it in money.

The district court rightly remanded the plaintiff to the custody of the sheriff's jailer.

Affirmed.

STATE *v.* JORDAN

Supreme Court of Iowa, 1874. 39 Iowa 387.

"The defendant was indicted for keeping a nuisance; he pleaded guilty and was fined five hundred dollars, and ordered confined at hard labor until said fine and costs are paid, said labor to be performed in or out of jail under the direction of the sheriff of said county. The defendant appeals."

COLE, J. . . . .

II. It is further urged here that the court erred in ordering the defendant to be confined at hard labor until said fine and costs are paid, at the rate of one dollar and fifty cents per day. This point involves the proper construction of our Code:

"Sec. 4092. Whoever is convicted of erecting, causing or continuing a public or common nuisance, as described in this chapter, or at common law, when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided.

"Sec. 4509. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.

"Sec. 4736. Any able bodied male person over the age of sixteen years, and not over the age of fifty years, now or hereafter confined in any jail in this State, under the judgment of any court of record or of any other tribunal authorized to imprison for the violation of any law, ordinance, or by-law, or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such court or other tribunal, when passing final judgment of imprisonment, whether for non-payment of

fine or otherwise, shall have the power to determine, and shall determine, whether such imprisonment shall be at hard labor or not.

"Sec. 4611. When any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not complied with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed, on demand, with interest, accompanied with a written schedule containing a true account of all his property, of every kind, by him signed and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county."

Briefly, and without elaboration, our construction of these several sections may be stated as follows: The penalty for nuisance is like any other penalty, and justifies the same orders respecting imprisonment for nonpayment. The next section allows that a judgment for fine may direct imprisonment till it is paid, but limits the power of the court so to imprison, to such time as shall not exceed one day for every three and one-third dollars of the fine; the court has no power under this section to direct that the party shall be imprisoned till the fine be paid at one dollar and fifty cents a day. But it may, under the next section, direct that the defendant be required to labor during his imprisonment. For such labor he will be entitled to a credit, under Sec. 4741, upon the judgment for one dollar and fifty cents for each day. He is entitled to no credit upon the judgment for the three and one-third dollars mentioned in Sec. 4509; that only serves to measure the duration of his imprisonment. But when he has been imprisoned thirty days, and then makes the schedule and gives his note, under Sec. 4611, he is entitled to have the judgment satisfied. *The State* v. *Van Vleet,* 23 Iowa, 168; *Polk County* v. *Hierb,* 37 Iowa, 351. As to the validity, or effect if valid, of the last part of Sec. 4741, denying the benefit of Sec. 4611 to poor convicts, if, in the opinion of the sheriff, they are able to satisfy the judgment by labor, we are not called upon to determine.

It follows from this view that the court erred in directing the imprisonment until the fine and costs are paid by the labor at the rate of one dollar and fifty cents per day. It will be so modified as to limit the time of imprisonment to one day for every three and one-third dollars of the fine; that the defendant be required to labor

during the time of his imprisonment and that he be credited upon the judgment for such labor, at the rate of one dollar and fifty cents per day. With this modification, the judgment will be, at the costs of the appellee,

Affirmed.

CHAPTER XVIII

EXECUTION

"When a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution" (5443, C. C. 9536). "A judgment for imprisonment, or for imprisonment until a fine is paid, to be executed in the county where the trial is had, shall be executed by the sheriff thereof, and return made upon the execution, which shall be delivered to and filed by the clerk of said court. Under all other judgments for imprisonment, the sheriff shall deliver a certified copy of the execution with the body of the defendant to the keeper of the jail or penitentiary in which the defendant is to be imprisoned in execution of the judgment, and take his receipt therefor on a duplicate copy thereof, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon, and a minute of said return shall be entered by the clerk as a part of the record of the proceedings in the cause in which the execution issued; and when such defendant is discharged from custody, the jailer or warden of the penitentiary shall make return of such fact to the proper court, and an entry thereof shall be made by its clerk as is required in the first instance" (5444, C. C. 9531. See 5445, C. C. 9540).

"Upon a judgment for a fine, an execution may be issued as upon a judgment in a civil case, and return thereof shall be made in like manner" (5446, C. C. 9541). "When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, an execution consisting of a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same, with his doings under the same thereon indorsed, to the clerk of the court in which the judgment was rendered, within seventy days after the date of the certificate of such certified copy, except as hereinbefore provided for" (5447, C. C. 9542).

"When the court or jury shall direct that a defendant be punished by death, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant shall be imprisoned in the penitentiary" (4732, C. C. 9543. See C. C. 9544–9545). "The only officers who shall have power to reprieve or suspend the execution of a judgment of death are the governor and, as provided in this chapter, the warden of the penitentiary, except in cases of appeal to the supreme court" (4735, C. C. 9546). "When the warden of the penitentiary is satisfied that there are reasonable grounds for believing that a defendant in his charge under sentence of death is insane or pregnant, he shall notify the commissioners of insanity of the county wherein the penitentiary is located, who shall be sworn by the warden well and truly to inquire into the facts as to the insanity or pregnancy of the defendant, as the case may be, and return a true report of their findings" (4736, C. C. 9547). "The commissioners, after being sworn, shall examine the defendant and hear any evidence that may be presented, and may examine the medical attendants at the penitentiary, if necessary, to ascertain the facts, and make report thereon in writing, signed by not less than a majority of them, finding as to the fact of insanity or pregnancy" (4737, C. C. 9548). "If the report does not show the defendant to be insane or pregnant, the warden shall not suspend the execution; but if it does, he shall suspend the execution, and immediately transmit the report to the governor" (4738, C. C. 9549).

"When a judgment of death from any cause has not been executed on the day appointed by the court therefor, the governor, by a warrant under the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution" (4739, C. C. 9550).

"A judgment of death must be executed by the sheriff of the county in which the judgment was rendered, or his deputy, within the walls of the penitentiary where the defendant is confined, or within a yard or inclosure adjoining thereto, on the day fixed in the judgment, between sunrise and sunset, by hanging by the neck until dead" (4740, C. C. 9551. See 4741–4743, C. C. 9552–9554).

"An appeal from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody without bail to abide the judgment thereon" (4744, C. C. 9555. See 4745–4746, C. C. 9556–9557).

CHAPTER XIX

APPEAL

The common law method of reviewing the proceedings and judgment of a trial court was by a writ of error, which method was adopted by our early statutes.[1] But now "the mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case is by appeal" which "can only be taken from the final judgment, and within six months thereafter" (C. C. 9559). "Either the defendant or state may appeal" (Ibid.), but an appeal by the state "in no case stays the operation of a judgment in favor of the defendant" (5452, C. C. 9563) nor can the supreme court reverse or modify the judgment, but it "shall point out any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law" (5463, C. C. 9574).

"An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it" (5453, C. C. 9564). "When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate, under the seal of the court, that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon; and if it has not been issued it shall not be until after final judgment on the appeal" (5454, C. C. 9565, —see 5451, C. C. 9560).

"An appeal is taken and perfected by the party or his attorney serving on the adverse party, or his attorney of record in the dis-

[1] *State* v. *Douglass* (1848), 1 G. Greene 550.

trict court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto'' (5449, C. C. 9561). ''When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, certify the same under the seal of the court, and transmit the same to the clerk of the supreme court'' (5450, C. C. 9562). ''The party appealing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term'' (5455, C. C. 9566).

''The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary'' (5456, C. C. 9567). ''An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time; and the supreme court must direct how it shall be corrected'' (5457, C. C. 9568). ''No assignment of error is necessary'' (5458, C. C. 9569). ''The defendant is entitled to close the argument'' (5459, C. C. 9570).

''If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant, on the appeal of defendant, he shall be entitled to recover the cost of printing abstracts and briefs, not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken'' (5462, C. C. 9572–9573).

''If a judgment against the defendant is reversed, such reversal

shall be deemed an order for a new trial unless the supreme court shall direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him'' (C. C. 9575). ''On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided'' (5465, C. C. 9576). ''The opinion of the supreme court must be in writing, filed with its clerk, and recorded'' (5460, C. C. 9577,—and see 5466, C. C. 9578).

''Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion'' (5467, C. C. 9579). ''If a defendant imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction'' (5468, C. C. 9580).

''The record and case may be presented in the supreme court by printed abstracts, arguments, motions and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases'' (5461, C. C. 9571).

STATE *v.* SEAMONS

Supreme Court of Iowa, 1848. 1 G. Gr. 418.

Opinion by GREENE, J. Indictment with intent to inflict a bodily injury. The first count, so far as applicable to the present inquiry, charges ''that Albert H. Seamons, of &c., on the seventh day of November, A. D., 1847 with force and arms, at, &c., did unlawfully, wilfully, and feloniously, make an assault upon Henderson Boggs with a deadly weapon, with an intent then and there to inflict upon, &c., a bodily injury, without any considerable provocation appearing, against the peace,'' &c. The second count contains all the material averments of the first, with the additional charge that the assault was made ''with a large rock of the weight of two pounds, the same being a deadly instrument, with an intent,'' &c.; when the circumstances of the assault evinced ''an abandoned and malignant heart,'' &c.

A demurrer having been filed, it was sustained by the court, and the indictment quashed.

The appeal is now made to us, was not this an erroneous decision?

There were three causes of demurrer urged.

. . . . In a word, the indictment states, at least in substance, all the facts which constitute the offence under the enactment referred to, and clearly discloses an indictable offence, sufficiently specific to advise the accused of its nature, and to enable him to plead a conviction or acquittal upon it, in bar of another prosecution for the same offence. This is all that should be required by any court.

Judgment reversed.

STATE *v.* FORD

Supreme Court of Iowa, 1913. 161 Iowa 323, 142 N. W. 984.

LADD, J. The accusation against D. D. Ford and John Pumroy is the "violation of Code, section 2419, in conveying such liquor to one not a permit holder"; the liquor previously having been described as intoxicating. The charge is not specific, but the sufficiency of the information is not questioned. The particular offense was in carrying, as employees of a drayman, three cases of beer shipped by H. Brew Company from Rock Island, Ill., *via* the Chicago, Milwaukee & St. Paul Railway Company, to three persons at Ottumwa, Iowa; the defendants having procured the said cases from the railroad company at its depot by virtue of the order of the consignees. The defendants were acquitted in the police court and the property ordered returned. On appeal by the state, the district court affirmed the decision, holding in effect that under the so-called Wilson Act the liquors had not so arrived in Iowa as to render these subject to its laws. See, as bearing thereon, *Louisville Ry. Co.* v. *F. W. Cook Brewing Co.*, 223 U. S. 70 (32 Sup. Ct. 189, 56 L. Ed. 355); *State* v. *Wignall*, 150 Iowa, 650; *State* v. *Intoxicating Liquors*, 106 Me. 138 (76 Atl. 265, 29 L. R. A. (N. S.) 745, 20 Ann. Cas. 668); *Gulf, etc., C. F. Ry. Co.* v. *State*, 28 Okl. 754 (116 Pac. 176, 35 L. R. A. (N. S.) 456); *State* v. *18 Casks of Beer*, 24 Okl. 786 (104 Pac. 1093, 25 L. R. A. (N. S.) 492); *State* v. *Kirmeyer*, 88 Kan. 589 (128 Pac. 1114).

The jurisdiction of the district court to entertain the appeal by the state was challenged and the question is again raised in this court. Unless the cause was appealable from the police to the district court, this court could acquire no jurisdiction, and of course, if the district court was without authority to entertain the appeal,

the power of review might not be conferred by consent or waiver, though the state has so argued, and the mere fact that the defendants did not appeal from the order overruling the motion to dismiss in the district court would not prevent them from raising the question here. It is elementary that jurisdiction may be challenged at any stage of the proceedings.

An appeal by the state from a judgment in favor of a defendant in a criminal case entered in the district court is authorized by section 5448 of the Code but merely for the exposition of the law with reference to the error complained of. Section 5463, Code. In trials before a justice of peace, the right of appeal is expressly conferred on the defendant both by the statute and the Constitution (section 11, art. 1, Constitution; section 5612, Code), and an appeal from the judgment of the district court by the state to the Supreme Court is expressly authorized by section 5620 of the Code. No appeal, however, is authorized from a judgment in favor of the defendant in the justice court or police court.

Nor do we think that jurisdiction is conferred on the district court. Section 6 of article 5 of the Constitution declares that, "The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law." No statute has undertaken to confer jurisdiction of appeals by the state from judgments for the defendants in either the police or justice court. It is well settled in this state that, in the absence of a statute authorizing an appeal by the state, an appellate court cannot acquire jurisdiction to review the proceedings below. *State* v. *Johnson,* 2 Iowa, 549; *State* v. *Van Horton,* 26 Iowa, 402; *State* v. *Tait,* 22 Iowa, 140. And it is adjudicated elsewhere, by the overwhelming weight of authority, that the state may not sue out a writ of error or take an appeal from a judgment in favor of the defendant in a criminal case, whether rendered upon a verdict of acquittal or upon a question of law determined by the court, unless authorized by statute. *People* v. *Miner,* 144 Ill. 308 (33 N. E. 40, 19 L. R. A. 342) and note; *United States* v. *Sanges,* 144 U. S. 310 (12 Sup. Ct. 609, 36 L. Ed. 445); *People* v. *Raymond,* 18 Colo. 242 (32 Pac. 429, 19 L. R. A. 649); *City of Milwaukee* v. *Weiss,* 93 Wis. 653 (68 N. W. 390).

While the cases generally deal with the matter of appeal from courts of record, the principle applies in a case like this. An appeal by the prosecutor was not permitted at the common law, and there is no tenable ground for allowing it, in the absence of statute, where

the judgment is of acquittal or discharges defendant in justice or police court.

The appeal is

Dismissed.

STATE *v.* McKINNON

Supreme Court of Iowa, 1913. 158 Iowa 619, 138 N. W. 523.

EVANS, J. . . . .

IV. In the closing argument to the jury, the prosecuting attorney used the following language: "It is practically admitted that he committed this crime." This statement was objected to by counsel for the defense as improper and unfair, and the objection was sustained by the court. Later in the argument the following was said: "While she is telling her story of shame and disgrace, the defendant sits here smiling, grinning at her, apparantly gloating over his conquest." This was objected to as "improper, and as referring to something that cannot be in the record." No direct ruling was made upon this objection. Later in the argument the following occurred: "They want you to say that he is a poor homeless boy; that he has got an imaginary father and mother somewhere. I think, if counsel would imagine a little more correctly, they would imagine a deserted wife and children somewhere instead of a father. Mr. Seneff: Just a moment; your honor, we object to such a statement as that as misconduct on the part of the state's attorney in closing argument, and ask that the jury be admonished not to consider such statement. Court: I think that objection should be sustained. The jury should not pay any attention to the statement made by counsel." Complaint is made of the statements in argument above quoted. The conduct of attorneys in the course of argument is a matter peculiarly within the discretion and power of the trial court. As to the first and third of the above complaints, we think they were fairly and sufficiently dealt with by the trial court. The last statement particularly purports to have been made in response to statements in argument by defendant's counsel. The trial court was in a position to know how much justification or mitigation there was for the purported response of the county attorney.

As to the second complaint, the propriety of the argument was peculiarly within the observation of the court. If the defendant conducted himself in the manner stated while the prosecutrix was upon the stand, he was necessarily subject to the observation of the jury, nor do we see any fair reason why reasonable comment upon such conduct might not be made in argument to the jury.

V. In the foregoing paragraph, we have confined our consideration to those parts of the argument of the county attorney to which objection was made at the trial. Objections are now urged here to considerable portions of such argument to which no objection appears to have been made in the trial court. The closing address of the county attorney was taken down in full in shorthand, and was included as part of the record. It is presented to us in full. Several portions of it are singled out in argument, and urged upon our attention as grounds of reversal. The record does not disclose that any of these passages were made the basis of a complaint or a ground of motion for a new trial in the court below. The motion for a new trial presented twenty-three grounds or paragraphs. The twenty-third paragraph was as follows: "Misconduct of the prosecuting attorney in closing argument." So far as appears in this record, the only misconduct to which the attention of the trial court was directed either by motion for new trial or otherwise was that which we have already considered in the preceding paragraph. The argument of the county attorney cannot be brought here for original review. We will only consider those portions thereof which were presented to the consideration of the trial court. It is perhaps true that it was not necessary for the appellant to renew repeated objections to the argument of the county attorney. But it was necessary for him in some way at some time to bring his specific complaint as to alleged misconduct to the notice of the trial court. The twenty-third paragraph of the motion for a new trial did not purport to go beyond the objections and exceptions already made.

We may say, also, that such portions of the closing argument as are complained of purported to be in response to statements of counsel for defendant in argument. Such arguments were not presented. Whether such closing argument was fairly responsive to what had been said by counsel for defendants, even though beyond the record, was peculiarly within the observation and knowledge of the trial judge. It is sometimes true in the trial of criminal cases that the county attorney is not the first offender along that line. In view of the state of the record as indicated, we will not undertake to review further the closing argument.

It is suggested in argument that the defendant did not become a witness in his own behalf, and that he was therefore prejudiced by the statement that the crime was practically admitted. The defendant, however, asked an instruction on that subject, which the court gave. If this statement of the closing argument should be deemed

a violation of the provisions of section 5484, then defendant was entitled to a new trial for that cause alone under the provisions of such section. But the defendant did not ask for a new trial on that ground. That question is therefore eliminated from our consideration. The foregoing disposes of the principal matters pressed upon our attention. The case is one of great importance. We are satisfied upon the record that the defendant has had a fair trial, and that the evidence of his guilt is practically conclusive.

The judgment entered below is therefore

Affirmed.

STATE *v.* DANIELS

Supreme Court of Iowa, 1875. 41 Iowa 700.

COLE, J.—In this cause we have not been favored with an argument for the appellant, nor even an assignment of errors; but, as it is made our duty "to examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands"—we have made such examination, and in our opinion the law demands that the judgment in this case shall be

Affirmed.

STATE *v.* SLATER

Supreme Court of Iowa, 1859. 8 Iowa 420.

STOCKTON, J. . . . .

The fifth assignment of error is entirely too vague, and does not point out with any reasonable clearness the objections taken by the defendant to the instructions given and refused. Where the nature of the case will admit it, the assignment of error must be so explicit as to direct the attention of the court to the particular portion of the charge of the court objected to. It cannot be expected that the court will wade through a mass of instructions, to hunt up errors in the record not plainly pointed out by the party, and but vaguely insinuated by his assignment.

. . . . . .

Affirmed.

STATE *v.* McCORMICK

Supreme Court of Iowa, 1869. 27 Iowa 402.

The defendant was convicted of murder in the first degree and sentenced to be executed. From this judgment he appealed.

DILLON, CH. J. . . . .

II. The fourth instruction to the jury was erroneous because the mere proof of killing without more does not raise the presumption, as the court charged, that it was done willfully, deliberately and premeditatedly, in other words, it does not raise the presumption that the defendant is guilty of murder in the first degree. *State* v. *Turner,* Wright (Ohio), 20; *Hill's Case,* 2 Gratt. (Va.) 594; *People* v. *White,* 24 Wend. 580; *Johnson* v. *Com,* 24 Pa. St. 386; *Kelly* v. *Com,* 1 Grant Cas. (Pa.) 484.

The instruction tells the jury that, if they find that the defendant killed the deceased, the law presumes not only that he intended to kill him, but that he did it willfully, deliberately and premeditatedly. This is stating the rule too broadly and too strongly. It is suggested that there are cases which will support this instruction. If so, we cannot follow them. But this instruction is claimed to be erroneous only as to the *degree* of the offense. It is admitted by the counsel for the prisoner that the indictment is sufficient as one charging murder in the second degree, and that the above instruction of the court is erroneous only so far as it relates to the degree of the offense.

There is no claim that the evidence does not establish the guilt of the defendant.

His counsel insists that the record does not warrant a conviction for any higher offense than murder in the second degree. And such is the opinion of this court.

Defendant's counsel asks not for a new trial, but simply that the judgment of the court below be modified by virtue of the power which the statute confers upon this court. Rev. §4925.

Acting upon the suggestion, to which no objection has been made by the Attorney-General, upon the power given by the statute, upon the precedent in the case of *Fouts* v. *The State, supra,* the circumstances which have come under our observation respecting the prisoner, we are of opinion that the cause of public justice and the safety of community will be best advanced by not ordering a new trial, but by sustaining the conviction as one for murder in the second degree, and adjudging that the defendant be imprisoned for life in the penitentiary of the State.

The circumstances referred to respecting the prisoner are not to be taken as indicating that we have any doubt as to his guilt; or as to the deep, dark, unrelieved enormity of his offense, or that he does not signally merit the punishment denounced against him.

There is no mitigating circumstance unless it may be that the defendant is destitute of any developed moral nature, and acts in

obedience to his appetite or his passions without being possessed of any efficient restraint or control over them.

The welfare and safety of society require, as we think, that we should not make his punishment for any less period than the term of his natural life.

Judgment will be entered accordingly.

CHAPTER XX

CERTIORARI

Certiorari is "the name of a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding, or all the record and proceedings in a cause before verdict, with its certificate to the correctness and completeness of the record, for review or trial; or it may serve to bring up the record of a case already terminated below, if the inferior court is not one of record, or in cases where the procedure is not according to the course of the common law."[1] This writ "may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy" (4154, C. C. 8244—see 4155–4162, C. C. 8245–8252, and see C. C. 679). "No appeal lies from an order to punish for contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari" (4468, C. C. 8327).

STATE *v.* DISTRICT COURT OF BUCHANAN COUNTY

Supreme Court of Iowa, 1891. 84 Iowa 167, 50 N. W. 677.

"This is a *certiorari* proceeding to test the validity of an order admitting to bail a person adjudged to be guilty of a contempt of court."

ROBINSON, J.—In January, 1890, an action in equity was commenced in the district court of Buchanan county against one M. A. Dougherty, for the purpose of having him enjoined from keeping for sale, and for selling, intoxicating liquors, in violation of law, and from maintaining a place for that purpose. In April of that year the district court rendered a final decree, in which the relief sought was granted. On the thirtieth day of the next August an affidavit was filed charging Dougherty with having violated the injunction. A hearing was had on the issues presented by the affidavit, and the answer thereto filed by Dougherty, which resulted in a finding that Dougherty had been guilty of a violation of the

[1] Black's Law Dictionary.

injunction. He was adjudged to pay a fine of seven hundred dollars, and to be imprisoned in the county jail, as provided by law, until such fine should be paid. The order also included the following: "Defendant to be admitted to bail in the sum of one thousand dollars pending review of these proceedings." A bail bond in the sum named was given by Dougherty and filed with the papers in the case.

The only question presented for our determination is the correctness of that part of the order which admitted Dougherty to bail. The finding that Dougherty had violated the terms of the injunction was, in effect, an adjudication that he was guilty of a contempt of court, and the punishment inflicted was designed to punish that offense. Section 12, chapter 143, Acts, Twentieth General Assembly; section 4, chapter 73, Acts, Twenty-Second General Assembly. Section 3499 of the Code is as follows: "No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by *certiorari*." The writ of *certiorari* to the district court or to a judge thereof can only be granted by the supreme court, or by one of its judges. Code, sec. 3217. When a stay of proceedings is sought "the writ can only be issued by a court or judge, who may require a bond and fix the penalty and conditions thereof." Code, sec. 3218. It appears from these provisions that the only means of reviewing the order of the district court punishing Dougherty for contempt was by *certiorari* proceedings; that the writ of *certiorari* could only be granted by this court, or in vacation by one of its judges. Section 3218 does not state, in express terms, that when a stay of proceedings is sought, and a bond is required, no court or judge but the one granting the writ shall authorize the giving of the bond; but that construction is necessarily implied in the language used, and no other is permissible. In this case the district court acted without jurisdiction in admitting the person found guilty of contempt to bail, and the portion of the order which sought to accomplish that end is

Annulled.

STATE *v.* DISTRICT COURT OF MAHASKA COUNTY

Supreme Court of Iowa, 1906. 132 Iowa 603, 109 N. W. 1085, 11 Ann. Cas. 296.

This was a certiorari proceeding sued out in the supreme court to test the validity of an order of the district court.

LADD, J.—Judgment was spread upon the records of the district court May 13, 1898, that the petitioner serve a term of one year in

the penitentiary at Ft. Madison, and pay the costs of his conviction of the crime of manslaughter. The sentence was executed. On the 26th day of March, 1906, nearly six years afterwards, the county attorney filed a motion for a *nunc pro tunc* order correcting the judgment by inserting therein a fine of $500, on the ground that it was a part of the court's sentence but omitted from the records by the neglect or oversight of the clerk. The petitioner was duly notified of this motion, but did not appear, and the court, after hearing the evidence, entered the order as prayed. The power of a court of record to enter judgments *nunc pro tunc* in civil cases is universally recognized. *Doughty* v. *Meek,* 105 Iowa, 16. See note to *Ninde* v. *Clark,* 4 Am. St. Rep. 823; 1 Black on Judgments, section 126 *et seq.*; 1 Freeman on Judgments, section 56 *et seq.* And the rule is equally well established that mere formal or clerical errors or omissions or mistakes in the entries of the clerk concerning matters of procedure in criminal cases may be corrected by *nunc pro tunc* orders. Thus, in *May* v. *People,* 92 Ill. 343, *Green* v. *State,* 19 Ark. 178, and *Burnett* v. *State,* 114 Tex. 455 (65 Am. Dec. 131), the record was corrected so as to show the return of an indictment, and in *State* v. *Farrar,* 104 N. C. 702 (10 S. E. 159), and *State* v. *Fiester,* 32 Or. 254 (50 Pac. 561), so as to show the entry of a plea of not guilty. In *Ex parte Jones,* 61 Ala. 399, the amount of costs was held properly inserted in the judgment of conviction by the trial court at a succeeding term. But the costs are no part of the sentence. *State* v. *Cook,* 115 N. C. 764 (20 S. E. 513, 29 L. R. A. 261). In *People* v. *Bemis,* 51 Mich. 422 (16 N. W. 794), the correction of an entry, so as to show the verdict to have been for murder in the first degree and of the sentence made within a month, and, for all that appears, at the same term of court was approved. Mr. Bishop, in his work on Criminal Procedure, says: "The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term, yet this is a power the extent of which is limited and not easily defined." See, also, *In re Wight,* 134 U. S. 136, (10 Sup. Ct. 487, 33 L. Ed. 865). *Bilansky* v. *State,* 3 Minn. 427 (Gil. 313); *Smith* v. *State,* 71 Ind. 250. Note to *O'Sullivan* v. *People,* 20 L. R. A. 143, and cases collected in 19 Enc. Pl. & Pr. 495. *In re Black,* 52 Kan. 67, (34 Pac. 414, 39 Am. St. Rep. 333); *Weatherman* v. *Commonwealth,* 91 Va. 799, (22 S. E. 349).

But in no case to which our attention has been directed or which we have been able to discover has any court, by the entry of such an order, corrected a former judgment or sentence in a criminal cause

by adding a fine or in any way increasing the penalty denounced against the accused. Our statute requires judgment to be pronounced on a day fixed (section 5431, Code), and a certified copy of the judgment as it appears on the record book "must be forthwith furnished the officer whose duty it is to execute the same, who shall proceed and execute it accordingly" (section 5443). "A judgment for imprisonment, or for imprisonment until a fine is paid, to be executed in the county where the trial is had, shall be executed by the sheriff thereof, and return made upon the execution, which shall be delivered to and filed by the clerk of said court. Under all other judgments for imprisonment, the sheriff shall deliver a certified copy of the execution with the body of the defendant to the keeper of the jail or penitentiary in which the defendant is to be imprisoned in execution of the judgment, and take his receipt therefor on a duplicate copy thereof, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon, and minute of said return shall be entered by the clerk as a part of the record of the proceedings in the cause in which the execution issued; and when such defendant is discharged from custody, the jailer or warden of the penitentiary shall make return of such fact to the proper court, and entry thereof shall be made by its clerk as is required in the first instance" (section 5444).

The manifest design is that the sentence of the law shall be speedily executed. Indeed, this court has held that the courts are without authority to suspend the enforcement of sentences after being pronounced. *State* v. *Voss,* 80 Iowa, 467. And, even where unlawfully suspended, some courts hold that, notwithstanding this and that defendant is at large at his own election, the term of imprisonment begins to run from the date of the judgment. *In re Webb,* 89 Wis. 354, (62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846). *In re Markuson,* 5 N. D. 180, (64 N. W. 939). But, in *Miller* v. *Evans,* 115 Iowa, 101, where the petitioner had been fined $300, and mittimus was not served until his term of imprisonment would have expired had he been incarcerated, this court held that the time of execution was not of the essence of the judgment unless so made by a demand that it be immediately carried out, and that the prisoner cannot profit by a delay to which he has assented or in which he has acquiesced without objection. It does not follow, however, that after the sentence of the court as it appears of record has been executed and the judgment satisfied as contemplated by law, the State may have the record re-examined and an additional

penalty imposed on the pretext that it has been omitted through mistake. While the sentence is pronounced by the judge it is evidenced by the records only. *Callanan* v. *Votruba,* 104 Iowa, 672; *King* v. *Dickson,* 114 Iowa, 160; *Kennedy* v. *Citizens' National Bank,* 119 Iowa, 123. It cannot be executed in installments, at least without the prisoner's assent. It cannot be postponed, even, save by his consent or acquiescence. He cannot be assumed to know that the penalty is other than appears of record, even though he may have heard the sentence. The judge may have noted it as less in the memoranda in his calendar or possibly have directed the clerk in making up the record to omit a part. In any event he is entitled to rely on the record, and, after the judgment as entered therein has been satisfied, cannot be held to have acquiesced in any delay thereafter in the correction of the record or the execution of an additional penalty omitted therefrom through neglect or inadvertence. The courts uniformly hold that the record may not be amended so as to increase the penalty after the term at which the sentence is pronounced (*Whitney* v. *State,* 6 Lea (Tenn.) 247; *People* v. *Whitson,* 74 Ill. 20); and many that a sentence partly served can not be modified even at the same term (*Grisham* v. *State,* 19 Tex. App. 504; *In re Jones,* 35 Neb. 502, (53 N. W. 469); *State* v. *Warren,* 92 N. C. 828; *Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872).

In *State* v. *Dougherty,* 70 Iowa, 439, this court was careful to limit the authority to change a sentence to a time before anything had been done thereunder. There must be a time when the court's jurisdiction over defendant's person by way of punishment ceases. Otherwise, it may continue indefinitely. Can it be possible that such jurisdiction in the same case may be invoked at any time in the future, and, through a *nunc pro tunc* order, not only a penalty added to the one satisfied of record, but the memory of an expiated crime revived? Shall the possibility of such an order be made a constant menace to the liberty of those once convicted of crime? Shall any of these be cast into prison because, forsooth, after the judgment has been satisfied, the memory of those who claim to have heard what the judge said in pronouncing sentence remember it differently than it appears of record? The entire doctrine of correcting records now for then rests upon the necessities in the administration of justice. Notwithstanding the greatest care, errors and omissions will be found in the records, deemed verities, and by this method these are amended lest litigants shall lose the benefits of the adjudication recorded. But the ends of justice will not be

served by permitting the State to open the judgment record in a criminal case long after the sentence of the law has been discharged for any purpose, and least of all to insert an additional penalty. To permit this to be done would be like punishing the delinquent the second time for the same offense which is denounced by all of the courts. *Ex parte Lange, supra; Ex parte Williams,* 8 South Fla. 425. Such a course would be contrary to sound public policy and ought not to be tolerated. The State is interested in the reformation of all delinquents, and in having their infractions of the law forgotten upon the expiation of the crime. In several States it is made by statute a misdemeanor for any person thereafter to allude thereto. With the satisfaction of the record in the manner indicated by the statute the entire matter becomes a part of the irrevocable past, and beyond the power of the court to add to or detract from.

The court should have denied the motion, and, as in entering the judgment it exceeded its jurisdiction, certiorari was the proper remedy. The motion to dismiss is overruled. The order of the district court is

Annulled.